THE TRIAL AND

EXECUTION OF BHUTTO

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Barrister-at-law



Reproduced By
Sani Hussain Panhwar
Member Sindh Council, PPP

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Dedicated to the people of Pakistan

Contents

Political Turmoil

> Suffering is one very long moment. We cannot divide it by seasons. We can only record its moods and chronicle their return.
>
> *Oscar Wilde*

Destiny is not always kind. Many great statesmen, soldiers and saints have been its victims and their worth ridiculed. Though I do not believe in Astrology, the "March link" on Pakistan is astounding. Astrologers have always forecast the month of March as being ill-starred for the country. It was on March 23, 1940 that the Muslim League finally committed itself to the two-nation theory and adopted the Lahore Resolution calling for the establishment of Pakistan as a separate State. In March, 1947 communal riots broke up in the Punjab which further led to the division of the Punjab and Bengal. In March, 1953 the Martial Law was imposed in Pakistan for the first time in the wake of the anti-Qadian riots. In March, 1971 the seeds for the division of Pakistan were sown in Dacca. In March, 1977 the elections put the country into an unprecedented political turmoil the aftermath of which is still haunting Pakistan. In March, 1978 Mr. Zulfikar Ali Bhutto was sentenced to death by the Lahore High Court. On March 24, 1979, the Supreme Court unanimously rejected the review petition filed by Mr. Bhutto.

The period from March to July, 1977 was one of protests, dialogues and deadlocks between the Pakistan National Alliance (PNA) and Mr. Z.A. Bhutto's Government, and on 5th July, 1977 General Mohammad Zia-ul-Haq took over as Chief Martial Law Administrator (CMLA) in a bloodless coup.

In the thirty years of the existence of Pakistan this was the third full-fledged military *coup d'etat* and a seventh effort to stop civil war in Pakistan as called by Martial Law Administrators. After 14th August 1947, there have been two attempts, two quasi-military and three full-fledged military *coup d'etats.* First military *coup d'etat* of General Mohammad Akbar Khan was attempted in 1951. The first quasi-military coup came in October 1954, when Ghulam Mohammad dissolved the Sovereign Constituent Assembly of Pakistan. The second quasi-military *coup d'etat* came in October 1955, when, in total violation of the Lahore Resolution of March 1940, provincial autonomy was abolished. In October, 1958, it was General Mohammed Ayub Khan; and in March 1969, General Yahya Khan ousted President Ayub. In March 1973, the Brigadiers military *coup d'etat*

was scotched. On 5th July, 1977 came the existing military *coup d'etat.*

General Zia-ul-Haq, Chief of the Army Staff, proclaimed Martial Law throughout Pakistan and assumed the office of the Chief Martial Law Administrator. His order and proclamation issued was as:

> "(A) The Constitution of the Islamic Republic of Pakistan shall remain in abeyance;
> "(B) The National Assembly, the Senate and the Provincial Assemblies shall stand dissolved;
> "(C) The Prime Minister, the Federal Minister, Minister of State, Advisers to the Prime Minister, the Speaker and Deputy Speaker of the National Assembly and the Provincial Governors, the Provincial Chief Ministers and the Provincial Ministers shall cease to hold office;
> "(D) The President of Pakistan shall continue in office; and
> "(E) The whole of Pakistan will come under Martial Law."

General Zia announced in a broadcast to the nation that all political activity will remain suspended "till further orders" but will be revived before the elections to be held in October.

Some of the excerpts of the English rendering of General Zia's address to the nation as put out by *Pakistan Times* were:

"You must have learnt by now that the Government of Mr. Zulfikar Ali Bhutto has ceased to exist and an Interim Government has been established in its place. This changeover which began at about midnight last night was completed by this morning.

"This action was carried out on my orders. During this period the former Prime Minister Zulfikar Ali Bhutto and some of his colleagues have been taken into protective custody. Likewise, all the prominent leaders of the Pakistan National Alliance except Begum Nasim Wali Khan have also been taken into custody.

"The reactions to this takeover have so far been very encouraging. A stream of congratulatory message has been pouring in from different quarters.

"It is necessary to add here that some people have expressed misgivings that the Army takeover may have been at the behest of someone. Could it be that General Zia had secretly concerted with the former Prime Minister? On this I can only say that truth can never remain unexposed. In fact, such an air of distrust has been created during the past few months that even well-meaning people get bogged down in doubts and apprehensions.

“The Army takeover is never a pleasant act because the armed forces of Pakistan genuinely want that the administration of the country should remain in the hands of the representatives of the people who are its real masters. The people exercise this right through their elected representatives who are chosen in every democratic country through periodic elections.

“The elections were held on 7th March last. The election results, however, were rejected by one of the contending parties. They alleged that the elections had been rigged on a large scale and demanded fresh elections. To press their demands for re-elections, they launched a movement which assumed such dimensions that people even started saying that democracy was not workable in Pakistan. But I genuinely feel that the survival of this country lies in democracy and democracy alone.

“It is mainly due to this belief that the armed forces resisted the temptation to takeover during the recent provocative circumstances in spite of diverse massive political pressures. The armed forces have always desired and tried for the political solution to political problems. That is why the armed forces stressed on the then Government that they should reach a compromise with their political rivals without any loss of time. The Government needed time to hold these talks. The armed forces brought them this valuable period of time by maintaining Law and Order in the country.

“The armed forces were subjected to criticism from certain quarters for their role in aid of the civil administration, but we tolerated this criticism in the hope that it was a passing phase.

“When the political leaders failed to rescue the country out of a crisis, it is an inexcusable sin for the armed forces to sit as silent spectators. It is primarily for this reason that the army had to intervene to save the country.

“I would like to point here that I saw no prospects of a compromise between the People’s Party and the PNA, because of their mutual distrust and lack of faith. It was feared that the failure of the PNA and PPP to reach a compromise would plunge the country into a more serious crisis. This risk could not be taken in view of the larger interests of the country.

“But the Constitution has not been abrogated. Only the operation of certain parts of the Constitution has been held in abeyance. Mr. Fazal Elahi Chowdhry has very kindly consented to continue to discharge his duties as President of Pakistan as heretofore under the same constitution.

“I will discharge the duties of the Chief of the Army Staff and Chief Martial

Law Administrator, Martial Law Orders and instructions, as and when required, will be issued under my orders.

"I want to make it absolutely clear that neither I have any political ambitions nor does the Army want to be taken away from its profession of soldiering. I was obliged to step in to fill in the vacuum created by the political leaders. I have accepted this challenge as a true soldier of Islam. My sole aim is to organise free and fair elections which would be held in October this year.

"Soon after the polls, power will be transferred to the elected representatives of the people. I give a solemn ′assurance that I will not deviate from this schedule. During the next three months my total attention will be concentrated on the holding of elections and I would not like to dissipate my powers and energies as Chief Martial Law Administrator on anything else.

"It will not be out of place to mention here that I hold the judiciary of the country in high esteem. I will do my best to refrain from doing anything which is likely to restrict the power of the judiciary. However, under unavoidable circumstances, if and when Martial Law Orders and Martial Law Regulations are issued, they would not be challenged in any court of law.

"I will soon announce the modalities and detailed timetable for holding of elections. I hope and expect that all political parties will cooperate with me in this behalf. A good measure of tension had been created in the country during the recent political conformation. It had therefore become imperative to allow time to cool off emotions. I have, therefore, banned all political activity from today till further orders. Political activity, however, will be allowed before the polls.

"It would be my utmost endeavor to ensure that the Martial Law Administration not only treats the people in a spirit of justice and equality but also makes them feel so. The civil administration too, has to play an important role in this behalf. I am, therefore, pleased to announce that the Chief Justices of the Provincial High Courts have, on my request, consented to become the Acting Governors of their respective provinces.

"The officers in the civil administration, who have any apprehensions about their future, are hereby assured that no victimization will take place. However, if any public servant fails in the discharge of his duties, shows partiality or betrays the confidence of the nation he will be given exemplary punishment. Similarly, if any citizen disturbs law and order in the country, he will also be severely dealt with.

"So far as foreign relations are concerned, I want to make it absolutely clear that I will honour all the agreements, commitments and contracts signed by the

outgoing Government.

"In the end, I would appeal to all the officers and men of the armed forces to discharge their duties justly and impartially. I hope they will deal with every situation without showing any undue lenience. I will also expect them to forgive those who have ridiculed or harassed them. This will be in the true Islamic tradition. I call upon them to preserve their own honour and that of their profession in the discharge of their duties. I am sure they will acquit themselves of their new responsibility honorably. This will certainly enhance their prestige and position in the society.

"I want to ensure you that the frontiers of Pakistan are fully guarded and the armed forces are there to discharge their duties. Authorised traffic across the borders is continuing.

"To conclude, I must say that the spirit of Islam, demonstrated during the recent movement, was commendable. It proves that Pakistan which was created in the name of Islam, will continue to survive only if it sticks to Islam. That is why; I consider the introduction of Islamic system as an essential prerequisite for the country."

General Zia also promulgated on July 5 an order called "The Laws (Continuance in Force) Order 1977".

According to this Order, some of the clauses stipulated that "The President shall act on and in accordance with the advice of the Chief Martial Law Administrator.

"The Governor of a province shall act on, and in accordance with, the advice of the Martial Law Administrator appointed by the Chief Martial Law Administrator for the province.

"No court, tribunal or other authority shall call or permit to be called in question the proclamation of the fifth day of July, 1977, or any order or ordinance made in pursuance thereof or any Martial Law Regulation or Martial Law Order.

"No judgment, decree, writ, order or process whatsoever shall be made or issued by a court or tribunal against the Chief Martial Law Administrator or any Martial Law Authority exercising powers or jurisdiction under the authority of the Chief Martial Law Administrator.

"Notwithstanding the abeyance of the provisions of the Constitution, but subject to any order of the President or regulation made by the Chief Martial Law Administrator, all laws, other than the Constitution, and all ordinances,

orders-in-council, orders made by the President, rules, bye-laws, regulations, notifications and other legal instruments in force in Pakistan or any part thereof, or having extra-territorial validity, shall, so far as may be and with such adaptations as the President may see fit to make, continue in force until altered, amended or repealed by competent authority.

Giving an account of the circumstances that led to and the factors behind the imposition of Martial Law, *Weekly Lailo Nihal,* Pakistan dated 23rd July 1977 said in an article:

"Although Mr. Bhutto says that he had been expecting the military action for the last two months, the fact remains that the Army Chief's decision to takeover the administration of the country was a surprise move and Mr. Bhutto was thoroughly checkmated by them.

"When the PNA said on July 3 that although it was prepared to accept the agreement, it sought guarantees for its implementation in the form of the powers of the high level implementation committee, Nawab-Zada Nasrullah Khan, Prof. Ghafoor Ahmed and Maulana Mufti Mehmood were insisting upon the PNA General Council to allow them to sign the agreement, while Air Marshal (Retd.) Asghar Khan and Pir Pagaro maintained that Mr. Bhutto was only buying time and had no intentions of honoring the agreement. They were absolutely right because Mr. Bhutto had by then come to know of the hidden government machinery that were supporting it.

"When the Cabinet met next evening, Mr. Bhutto's supporters suggested that they should discontinue the negotiations and instead talk in the language of force; but Gen. Zia-ul-Haq, the man who ultimately would have had to do it, was also present at the meeting and urged that another attempt should be made to negotiate a settlement since it would be better to have a political solution of the problem. Intelligent man that he was, Mr. Bhutto caught the hint and immediately declared that he was prepared to have further talks with the PNA. He could not obviously, have talked in the tough language of his colleagues for he had realised that his game was very nearly up.

"Mr. Bhutto summoned Cabinet Secretary Waqar Ahmed and Defence Secretary Ghulam 'shag Khan to discuss the situation after the Cabinet meeting and it was then that an unguarded sentence escaped his lips when he said that Zia had become more impossible than even the PNA. Those who were aware of the way former Prime Minister's mind worked could clearly visualise what his next step would be. He would have just summoned the Chief of Army Staff and told him that his services were no longer required since he had decided upon a change in the administrative set-up of the Army so that it could effectively discharge the responsibilities of maintaining law and order in the changed

circumstances. Mr. Bhutto did not, however, get any time to do that and failed to see the writing on the wall at that delicate but fateful moment."[1]

Mr. Z.A. Bhutto and some PNA leaders including Maulana Mufti Mehmood, Nawab Zada Nasrullah Khan, Prof. Ghafoor Ahmed, Maulana Shah Ahmed Noorani and Mr. Sherbaz Mazri were arrested for so-called protective custody and kept at Muree Hills. These leaders were later released one by one but Mr. Bhutto was released last. Gen. Zia-ul-Haq declared elections in October 1977, *i.e.*, within 90 days after the Martial Law was imposed. All the necessary arrangements were made in all the four provinces but as already expected the elections were postponed and later declared that the same shall be held only when the political circumstances shall permit.

After the elections were postponed, General Zia-ul-Haq, while justifying the Martial Law told a BBC representative in an interview that his sole aim was to achieve only one thing on July 5, and that was to revive the political Government. The interviewer Max Hastings[2] asked some very pertinent questions like:

"If Mr. Bhutto is convicted, under the circumstances in which he has been brought to trial, do you believe that it will in fact have any real effect on the level of his political support in the country?"

To this Gen. Zia answered "I think very definitely. If nothing else at least for the first time in 30 years we would have established that the politicians like anybody else have to answer to their deeds, and that for the first time in the history of Pakistan we are taking a politician to establish his credibility or to vindicate his honour, in the normal course of law according to the law of the land".

Max Hastings pointedly told Gen. Zia that at the time he took over, the regime had more good will than most military Governments enjoy when they take over in any country and yet the act which probably proved most controversial was the postponement of the elections. Was such an act worth the damage that it cost his credibility?

To this Gen Zia said, "I think two constructive steps that I have taken, or we have taken which have really established our credibility is to try Mr. Bhutto, because accountability was one of our aims. And whereas initially we said we should prepare the ground and leave it to the next Government, the mere fact that we have on ourselves taken this task of having the accountability of time of the parties, itself has not only earned a good name for the regime, I think it has

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[1] Selected excerpts from *Weekly Lailo Nihal.*

[2] *The Dawn,* 8th November 1977, article by Yehia M. Sayed.

also shown responsibility. The second thing by which I think the public opinion by and large has heaved a sigh of relief is by postponement of the elections on the first October".

"Max Hastings did not mince any words and he highlighted the fact that some people had been kept in prison, and some people had been flogged. Was this in keeping with the kind of image Zia expected to establish when he took power?

Gen. Zia's answer was, "Nobody is going to give me any loyalty unless I demanded it by right. And by establishing some of these fierce punishments, one of the basic aims was to establish authority and to snake them feel that if they do something wrong then they will be punished and they will be punished severely. That goes for flogging. And also it's an Islamic punishment.

"Somebody used the word 'barbaric', so I corrected them, I said now this has a religious bias also, because some of the punishments are Islamic in which that will get wrong ideas.

"Like flogging, it is not meant to harm an individual bodily or physically. You know Islam places more emphasis on the individual's self-respect; so if a man has done something wrong and if he is made to respect in certain ways of his self-respect that is definitely punishment. And not the physical or bodily injuries by flogging him to an extent that you take his skin off."

As a parting shot, Hastings asked, "Are you absolutely confident that, let's say at the latest within a year, you yourself will be back in private life as any chief of Army Staff can be"?

Gen. Zia: "I am looking forward and I am praying for it, and I am confident. The last time somebody asked, what makes you feel so confident that you will be able to hold elections, I said I am convinced. I am not only convinced, I have conviction, and I have the urge and I know the people of Pakistan are behind me. So I said by jingo, I will".

The repercussions of Martial Law in the country which are mentioned in nutshell were that the people of Lahore in general and PNA circles in particular, rejoiced at the announcement that 'elections would be held *Insha Allah* in October'. Sweets were distributed in different parts of the city and a local leader of PNA distributed as much as nine maunds of *Halwa.* Begum Nasim Wali Khan discarded the use of black *'dupatta'* which she had been wearing since the beginning of the PNA agitation. On July 6, she said, "I will now wear a white

dupatta since the chances of an end to the dark period have brightened".[3]

The CMLA issued 14 Martial Law Regulations (MLR) prescribing drastic punishments including those of five years R.I., whipping for strikes and political activity; 10 years R.I. for eve teasing; amputation of hand for theft and dacoity; death for attack on Government officials' property, *etc.*

The decisions of the Martial Law Authority issuing regulations (MLR's) and orders was final and could not be questioned in any court, tribunal or other authority including the Supreme Court and a High Court.

Whole of Pakistan was declared considered as the Martial Law area and was divided into following five Zones *vide* Martial Law Order No. 3 : Province of the Punjab; Province of the NWFP; Province of Sindh; Province of Baluchistan; and Northern Areas.

Special and Summary Military Courts were established *vide* MLR No. 4.

Martial Law Authorities were given power to summon and sentence absconders. A Martial Law Administrator or any person authorised by him was empowered to search and summon records. The CMLA promulgated Martial Law Regulations empowering him to order the detention of any person for preventing him from acting in any manner prejudicial to the purpose for which Martial Law has been proclaimed or to the security of Pakistan, public safety or interest, defence of Pakistan, the maintenance of peaceful conditions or the efficient conduct of Martial Law.[4] The President of Pakistan issued an order called "the Houses of Parliament and Provincial Assemblies (Election) Order 1977", setting out legal framework for holding the country's General Elections in the month of October 1977. The order set out details for elections to the Senate, the Assemblies, and the powers of Election Commission to declare a poll void and order related matters.

It was announced that the PPP and PNA leaders under protective custody would be released in a day or two and that restricted political activity will be allowed from August 1. 1977.

The Martial Law administration laid curbs on reception of leaders during travel by announcing that political parties would have to take permission from Martial Law Authorities to receive and see off their leaders, indicating the number of persons to be present on such occasions.[5] A press note issued at Rawalpindi by CML A Secretariat said that the number of persons authorised by

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[3] The Nawai Waqt, 7th July, 1977.
[4] *Pakistan Times,* July 23, 1977.
[5] *Pakistan Times,* August 7, 1977.

the Martial Law Authorities will not be exceeded and that this restriction would not be operative when political campaigning starts after *Id-ul-Fitr. It* also said that since railway travel could create security problem for the political leaders, it would be advisable for them to travel by air wherever such facilities are available. An MLR was issued to ban the use of public place till 14th or 15th of September, 1977, that was the day *Id-ul-Fitr* was celebrated.

In his broadcast to the nation on Radio and Television on the occasion of Pakistan's Independence day on August 14, 1977, Gen. Zia-ul-Haq warned the politicians that any of them obstructing the country's march towards so-called democracy would be severely dealt with.[6] He declared that the Armed Forces considered restoration of democracy essential for the survival of Pakistan and since any person frustrating this mission was not only an enemy of democracy but an enemy of Pakistan he would be administered the punishment he deserved.

The proposal for a code of ethics was discussed at the all-parties meeting held in Rawalpindi on September 13 under the Chairmanship of the Chief Martial Law Administrator. All Parties had accepted the need of such a code and the Pakistan People's Party and the Pakistan National Alliance had agreed to submit their proposals. These were, however, not received even after the beginning of political activity on September 18. The Chief Martial Law Administrator therefore, promulgated a code of ethics himself for the guidance of all concerned.

The 15 point code of conduct that came into force immediately was:

1. No political party or person shall act in a manner prejudicial to the integrity of Pakistan, Islamic ideology or Islam as a religion.
2. Nobody shall try to create hatred, enmity or ill-will between the citizens of Pakistan on the basis of religion, race, province, sect or community.
3. No processions of political nature shall be taken out in any manner or form.
4. No person of political party shall carry or stock weapons in a place where a political meeting is organised.
5. Nobody shall indulge in any activity which is repugnant to morality, decency and public order.
6. Personal attacks like dubbing somebody as *'kajir'* or a traitor shall not be made.
7. No attempt shall be made to disrupt a meeting of any political party.
8. Students, educational institutions and seats of learning shall, not be used for political purposes.
9. Nobody shall make an offer or promise of a gratification or gift to any

[6] *Pakistan Times, August* 16, 1977.

person so as to persuade him to withdraw his candidature for the contest.

10. No leaflets, hand bills, posters, periodicals or books shall be printed without clearly giving the name of the printers and publishers.
11. False allegations against the political opponents shall not be made and the private lives of the individuals shall not be scandalized.
12. The political activities and election campaign within the bounds of cantonments shall be governed by MLR No. 22.
13. Nothing shall be said or done which may divulge the officials. secrets or in any manner compromise the National Security.
14. Statements or comments likely to affect adversely Pakistan's relations with other countries shall not be made.
15. Television and Radio facilities for the propagation of party manifestos and political view shall be utilized for healthy, purposeful and objective ends.

On October 30, 1977 the President issued an Ordinance to amend a code of criminal procedure and empower the magistrate to acquit the accused at any stage of the case.[7]

This Ordinance was called the Code of Criminal Procedure (Amendment) Ordinance, 1977.

By virtue of the order nothing could be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if, after hearing the prosecutor and the accused and for reason to be recorded he considers that the charge is groundless or that there is no probability of the accused being convicted of any offence.

According to a press note issued by the CMLA Secretariat, it was stated that the previous regime had by means of successive amendments to the Constitution seriously curtailed the powers of the superior judiciary. Some of these amendments had also the implied effect of making the judiciary subservient to the Executive.

An amendment to CMLA Order No. 1 of 1977 stated, "these amendments to the extent that they affected integrity and independence of the judiciary have been qualified. This action has been taken in response to the general demand voice throughout the country by all sections of the public, including members of the Bar. The profound distrust of the superior judiciary which characterized the working of the previous regime has had many serious and deleterious working of effects on the national life. Accordingly, it was felt that prompt action was needed to vindicate the position of the judiciary and strengthen its constitutional

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[7] *Sun,* October 31, 1977.

status and at the same time to deny protection to the illegal and arbitrary orders and actions which these amendments provided in the past to such acts and actions. It is hoped that this step will prove as an important milestone in the path to the restoration of normal constitutional procedures.

"As an outcome of the promulgation of this order the office of the Chief Justice of Pakistan fell vacant and the President has been pleased to appoint the most senior judge of the Supreme Court Mr. Justice S. Anwar-Ul-Haq as Chief Justice of Pakistan with immediate effect."

Thereafter Gen. Zia stated fulfilling most of the 33 demands made by the PNA after March 1977. Some of the demands were:

(a) Elections to National and Provincial Assemblies to be held on a single day;
(b) Only Sessions Judges and Military Officers would be Returning Officers during elections;
(c) No nominations to be rejected on technical grounds:
(d) No separate polling stations for women voters;
(e) Fresh elections in POK;
(f) Release of all political detenus arrested after July 1, 1977;
(g) Dissolution of all special tribunals, national and provincial Assemblies;
(h) Appointment of a new Chief Election Commissioner;
(i) Return of the army to the barracks in Baluchistan, and
(j) Appointment of a neutral Chief Executive of the POK, *etc.*

In the meantime the mass media in a well coordinated move exposed alleged crimes of Bhutto which related to:

(a) Ordering the assassination of Ahmed Raza Kasuri by the Federal Security Force (FSF), leading to the death of his father, Nawab Mohammad Ahmed Khan;
(b) Illegal detention of 42 political leaders in Dalai Camp; and
(c) Bhutto's shady monetary transactions.

Martial Law Order No. 40 was issued as amendment to Martial Law Order No. 4 and paragraph 7, sub-paragraph (c) was substituted as:

> "The Court may award any of the punishment, or combination thereof as prescribed under Martial Law Order No. 5 except that of death, amputation of hand, imprisonment for life, rigorous imprisonment exceeding one year of whipping exceeding 15 stripes. Total detention period was increased to two years."

The CMLA issued MLO No. 27, 28 and 29 at Islamabad on January 2, 1978. On January 25, 1978, MLO No. 31 was issued providing for the establishment of such number of disqualification tribunals, as the CMLA deemed necessary, to disqualify the holders of public officers.[8]A list of 560 politicians was finalized by the Government to be disqualified but this was, however withheld pending its judicial review.[9] Eleven disqualification tribunals were established under the above referred order.

Martial Law Order No. 37 was issued empowering the Martial Law Administrator for granting permission to a person to sell, transfer or otherwise dispose of any of the properties and assets in respect of which he was required to submit a statement under this regulation.

A Presidential Ordinance was issued at Rawalpindi on October 16 prohibiting the formation of political parties which may be opposed to the Islamic ideology, or the sovereignty, integrity or security of Pakistan, or morality or maintenance of public order of the foreign aided.

The President, Gen. Mohammad Zia-ul-Haq simultaneously issued another Order which provides that whether the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the Islamic ideology, sovereignty, integrity or security of Pakistan, public order or morality, it shall, within 15 days of such declaration, refer the matter to the Supreme Court whose decision on such a reference shall be final.

Unlike Ayub Khan and Yahya Khan, Zia-ul-Haq did not have a towering personality to overshadow the senior Generals. A number of changes in the top echelons of the Pakistan Army were carried out which included posting of Lt. Gen. Jahanzeb Arbab, GOC V Corps, Karachi as Pakistan's representative to the permanent Military Deputies Group Headquarters CENTO, Ankara; shifting of Lt. Gen. Mohmad Iqbal from IV Corps Lahore to V Corps, Karachi and of Lt. Gen. Sawar Khan from XI Corps, Peshawar to IV Corps, Lahore. He tried to shift Lt. Gen. Faiz Ali Chisti, GOC X Corps Rawalpindi to another appointment but could not dislodge him.

Till the end of August, 1977 events moved as per the calculations of the PNA and the army. A number of PPP leaders and ex-ministers dissociated themselves from the party. However, the events took a surprise turn when on 13 September, 1977, the Punjab High Court ordered release of Bhutto on bail which resulted in resurgence of pro-Bhutto feelings sweeping across the country. Gen. Zia was compelled to re-arrest Bhutto and nine other leaders of the PPP including

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[8] *Pakistan Times,* January 26, 1978.

[9] *Nawai Waqt,* January 25, 1978.

Pirzada, Sheikh Mohmad. Rashid, Nasrullah Khan Khattack, Mohmad Iqbal Jadoon and Dr. Ghulam Hussain. It was announced that the PPP leaders would be tried by Military Tribunals. The detention of Bhutto and his nine conferrers was challenged in the court. The re-arrest of Mr. Bhutto made him a hero not only in his constituency but in the entire country, and his wife Mrs. Nusrat Bhutto and daughter Miss Benazir Bhutto started attracting mammoth crowds.

The PNA and the Martial Law Authorities realized that they could not outvote Bhutto if the elections were held on 18 October, 1977 and demanded the postponement of the elections and early trial and punishment to Mr. Bhutto.

The PNA was divided because of ideological differences and ambitious designs of the leaders of the Constituent parties, yet it continued its dialogue with the Govt. and succeeded in getting most of its demands accepted by the Martial Law Govt. Gen. Zia, on a number of occasions offered to include representatives of the PNA in a National Govt. which was stated to be parliamentary inform, headed by Gen. Zia as Prime Minister and the provincial Govt. to be led by their respective Martial Law Administrators as Chief Ministers. After prolonged negotiations and hard bargaining the PNA joined.

A test-tube Cabinet named as the Federal Cabinet was formed by Gen. Zia but in no way did it resolve the crisis. Gen. Zia said that he came to power with the help of the military and had formed this Cabinet. This, however, was not democracy. The Federal Cabinet of 21 full-fledged ministers and three Ministers for State had five members from the Muslim League, three each from Jamaat-e-Islami and Jamaat-Ul-Ulmai-lslam and one from the PDP. The three serving and one retired Generals who were members of the outgoing Cabinet were dropped. A last minute attempt made by the mediators to bring about reconciliation between the two old partners, the NDP and JUI, finally failed. The NDP decided to pull out from the PNA. Consequent to formation of a civilian Cabinet the Chief Martial Law Administrator, through MLR No. 40 on 24 August allowed limited activities in the country in the form of closed door meetings of the executive committees of the political parties, Press Conferences and interviews by their office bearers and enrolment of party members. After this permission also former NWFP Governor, Maj. Gen. (Rctd.) Nasir Ullah Khan Babr, was arrested at Peshawar for having made objectionable speeches at Swat during Miss Benazir Bhutto's tour of the NWFP.[10]

Zia from the very beginning had in mind the French model of Presidential form of Govt. which had already been adopted by Sri Lanka and Bangla Desh. Mr. Fazl Elahi Chowdhry requested to be relieved of his appointment as President on

[10] *The Musawat, September 21,* 1978.

completion of his term which ended in August, 1978 and Gen. Zia took it as a God given gift and decided to take over as President of Pakistan.

The official announcement of Mr. Chowdhry's relinquishing the office was made on September 14[11] and it said, "Mr Fazal Elahi Chowdhry will relinquish the office of President of Pakistan on September 16, 1978 in the afternoon after the expiry of his term.

"Mr Fazal Elahi Chowdhry is leaving the office of President at his normal term of office under the 1973 Constitution. Mr. Chowdhry will be entitled to leave under the rules.

"Gen. Zia will be sworn in at 5 p.m. on Saturday, September 16 by Mr. Justice Anwar-ul-Haq, Chief Justice of Pakistan.

"Gen. Zia will continue to be Chief of the Army Staff and Chief Martial Law Administrator."

Chowdhry Fazal Elahi issued the following order called the "President's Succession Order, 1978" on 15th September 1978.

"In pursuance of the proclamation of the fifth day of July, 1977, read with the Laws (Continuance in Force) Order, 1977 (CMLA Order No. 1 of 1977) and in exercise of all powers enabling him in that behalf, the President is pleased to make the following order:

"1. (1) This order may be called the President's Succession Order, 1978.
(2) It shall come into force at once.
"2. This order shall have effect notwithstanding any thing contained in the Constitution or any other law.
"3. (1)Upon the office of the President becoming vacant by reason of death, physical or mental incapacity, resignation, or by reason of the incumbent of that office relinquishing the charge of the office or for any other reasons before the election of a President, under the Constitution, the Chief Martial Law Administrator or such other person as may be designated by the Chief Martial Law Administrator shall be the President and shall perform all functions assigned to the President by or under the Constitution or by or under any law.
(2) Before entering upon his office, the President shall make before the Chief Justice of Pakistan oath in the form set out in the schedule.
"4. (1) If the Chief Martial Law Administrator is the President, he shall hold office until a President is elected in accordance with the Constitution:
(2) Provided that the Chief Martial Law Administrator may at any time

[11] *The Dawn*, September 15, 1978.

designate any other person to be the President and, if he does so, he shall cease to hold the office upon the person so designated entering upon the office.

(3) A person other than the Chief Martial Law Administrator who holds the office of President under this order shall, unless the Chief Martial Law Administrator otherwise directs, hold the office until a President is elected in accordance with the Constitution.

(4) A person other than the Chief Martial Law Administrator who holds the office of the President under this order nay, by writing under his hand, addressed to the Chief Martial Law Administrator, resign his office.

"5. The President, unless he is also the Chief Martial Law Administrator, shall be entitled to the salary, allowances and privileges provided for the President's salary, allowances and privileges Act 1975 (LVIII of 1975).

After taking over as President General Zia issued "Governors and Acting Governors (Appointment) Order, 1978", under which he could appoint any person to be the Governor of a province.[12]

The President Gen. Zia-ul-Haq amended Pakistan's electoral laws to provide for the introduction of separate electorate for the next general election.[13]

President Fazal Elahi Chowdhry's resignation moved Pakistan still further from the possibility of a return to democracy. It also removed last remaining symbol both of the unity of the Federation of Pakistan and of continuity of the first ever constitution to have received unanimous national endorsement. Contrary to general suspicions, Mr. Chowdhry's withdrawal was voluntary and not contrived. In fact General Zia did his utmost to persuade him to stay, and in desperation declared at a press conference that the President had agreed to stay on until elections were held.

Speaking informally to reporters a couple of days later, Mr. Chowdhry bluntly refused General Zia's assertion, asking, "How can he say that the constitution certainly provides for my staying until my elected successor steps in, but how can this provision imply that I shall stay even if elections are not held until doomsday?" Mr. Chowdhry's letter of September 12 to the General (unpublished anywhere so far) amply clarifies the position.

It states:

"Dear General, in continuation of the previous correspondence on the subject please refer to your letter No. 57/2 dated August 12, 1978, wherein it was stated that the matter regarding my office would be discussed towards the end of

12 *The Morning News,* September 19, 1978.
13 *Pakistan Times,* September 25, 1978.

August. Accordingly some discussion took place between us on the evening of August 28. I promised to send you a letter on this subject by September 12 when you were likely to be back from your tour of Iran.

"The political situation at the moment is that the New Cabinet has assumed full responsibilities for running the government. According to their public announcements, they contemplate bringing about vital change in the economic policy and the administrative system, besides holding of new elections on the basis of separate electoral rolls and fresh delimitation of constituencies.

"In my opinion, such measures would not only involve drastic changes in the existing laws, but would also necessarily result in the amendments of the constitution directly or indirectly, which would not fall within the scope of the doctrine of state necessity.

"The consequences of endorsing such measures would be dangerously embarrassing for me, in terms of my oath, and seriously raise the question of constitutional propriety in acting on advice to be tendered to me. In case of refusal to do so, this will land us in a constitutional deadlock.

"I had continued to perform the duties of my office in accordance with your advice, in the hope that elections would be held at the earliest under the constitution as laid down by the Supreme Court in their judgment in Constitution petition No. 1 of 1977, which also clearly restricts the promulgation of legislative measures to the doctrine of necessity.

"Now that there is no likelihood of elections being held soon and the amendments in the existing laws and constitution are bound to go beyond the scope of necessity, no useful purpose can be served by my continuing in office.

"Accordingly I intend to relinquish my office in the afternoon of 16th instant and proceed on four months leave, after the expiry of which I may be deemed to have retired.

Yours sincerely,
Fazal Elahi Chowdhry."

Following Mr. Chowdhry's letter, General Zia is said to have strived once again to persuade him to stay on. However, the President made the rigid condition that a firm date for elections be announced forthwith. This was an impossible demand to meet. General Mohammad Shariff, chairman of the joint Chiefs of Staff committee of Pakistan proceeded on leave and was also stated to have resigned his post. His reasons for retiring from the national scene were similar to those of President Chowdhry. Efforts were made to persuade him to

stay on, but the General was said to have expressed his inability and applied for leave preparatory to retirement forthwith.

There appeared to be a change in the attitude of the Martial Law regime towards the Ahmedia movement and the minority communities. Cases pending against a number of Ahmedias under Arms Act were withdrawn and ban lifted on rallies by Ahmedias. Provision was also made for separate electorates for the minorities.

Throughout the period under review the country faced labour unrest. Textile Mill workers clashed with the police in January 1978. Television workers at Lahore, Rawalpindi, Peshawar and Quetta forcibly occupied and took over T.V. stations agitating against the revision of their emoluments. The journalists had also been pressing for various demands and some of them resorted to hunger strike. Shias and Sunnies have clashed at several places using fire-arms and destroyed public and private property. On 'May Day' 20 leftist workers defied Martial Law Order. On the same day industrial workers throughout the country declared their resolve to wage a relentless struggle against all forms of exploitation. There was a general state of unrest and frustration amongst the masses in the country and the people were apparently no more afraid of Martial Law Regulations. Corruption in the Law-enforcing agencies and civil administration was rampant. The continuous upway trend in the prices of general commodities further increased the sense of frustration.

There was no significant change in the foreign policy of Pakistan after the removal of Bhutto. Agha Shahi continued to be Secretary General, Foreign Affairs. Continuity in foreign policy was evident from Pakistan's proposal in declaring a nuclear-free zone in South Asia, stand on Kashmir continuing unchanged collaboration in CENTO and RCD, and emphasis on relations with Islamic countries and sustaining cordial relations with China. China had been playing a major role in supplying much needed arsenal to the Armed Forces of Pakistan. High dignitaries of both the countries and delegations were paying frequent official visits. The late President of Afghanistan Doud imposed press censorship after the Military takeover in Pakistan. The April coup in Afghanistan took the Pakistan Govt. by surprise, though it offered no official comments, it was one of the first free noncommunist countries to recognize the new Govt. on 5 May, 1978. On the foreign affairs front, no significant achievement was made.

Eleven disqualification Tribunals were set up on February 3, 1978 under Martial Law Order No. 31 to decide the cases of the politicians whose conduct was not found above board in the preliminary scrutiny.[14]

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[14] *Pakistan Times,* February 4, 1978.

Simultaneously, the CMLA's Secretariat released the names of 193 politicians constituting the first batch, whose screening had been completed. Of these, 104 were cleared, without prejudice to any subsequent action that might be taken on the basis of the findings of an inquiry into the rigging of the March, 1977 elections. The cases of 89 politicians were referred to the disqualification tribunals.

A Disqualification Tribunal consists of an officer of the Armed Force not below the rank of a Brigadier or equivalatant and a person exercising the powers of a Sessions Judge or a first class Magistrate.

All politicians whose cases were referred to disqualification tribunals were debarred from political activity until proved not guilty of misconduct [15] according to Martial Law Order No. 38.

President Zia-ul-Haq made an unreserved offer to the PNA through Mufti Mehmood and Nawab-Zada Nassarullah Khan to transfer full power to it, even without elections in case it forges the alliance into a single integrated party.[16] Making this offer he urged the PNA components to merge themselves into a single party in the interest of national unity and progress and forget about the formation of Provincial Governments. Mr. S.M. Zafar, the Pakistan Muslim League Vice-President urged the PNA to accept the suggestion.[17] The Khaksar chief, Khan Mohammad Ashraf, also appealed on October 21, to accept the offer. But the NDP Chief, Mr. Sherbaz Mazari, said on that the Government had no mandate to transfer the power to the PNA. The Pakistan Musawat Party convener, Mr. Hanif Ramay, also said that the "lovers of democracy" would oppose the idea.[18] Maulana Shah Ahmed Noorani, JUP Chief also said that the present Government had no "political or constitutional right" to handover power to the PNA or anyone else. In a press statement issued at Lahore signed by the PNA's Women Wing by the Wings President, Begum Walida Mushtaq, and the Vice-President, Mrs. Jamila lkram, hailed the announcement and appealed to the heads of the parties to merge into one political party.

Gen. Zia-ul-Haq issued on December 2 the Shariat Benches of Superior Courts Order, 1978, providing for the Constitution of a "Shariat bench" at the High Court level in each province and a "Shariat Appeal Bench" at the Supreme Court level.[19]

Simultaneously making the epoch-making announcement in an address to the

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[15] *Pakistan Times,* February 28, 1978.
[16] *Dawn,* October 10, 1978.
[17] *Pakistan Times,* October 22, 1978.
[18] *Pakistan Times,* October 22, 78.
[19] *Pakistan Times,* December 3, 1978.

nation over the Radio and TV, on the first of new Hijra year 1399, Gen. Zia also outlined a package of other measures that would take the country towards "Nizame Islame" which he termed as the destiny of Pakistan. President Zia, as Chairman of the Azad Jammu and Kashmir Council, appointed Brig. Mohammad Hayat Khan as the President of Azad Jammu and Kashmir in place of Sardar Mohammad Ibrahim, who was relieved of his office.

Another order was promulgated providing for the constitution of a National Finance Commission to make recommendations about the distribution of the net proceeds of certain taxes between the Federation and the Provinces, their borrowing powers and any other financial matter referred to it.

According to Article 51 (2) (b) of Pakistan's 1973 Constitution, the voting age is 18 years but the voting age for the next elections was fixed 21 years. Pakistani Muslims who did not believe in the "absolute and unqualified finality of the prophet hood of Mohammad" could lose their right of franchise. Under a new order, every Muslim voter's head of family was to declare:

"I do hereby declare and solemnly affirm that I and all members of my family believe in the absolute and unqualified finality of the prophet hood of Mohammad, the last of the prophets and that none of us recognizes as a prophet or religious reformer any person who claims to be prophet after Mohammad."

This order follows a presidential promulgation providing for separate Muslim and non-Muslim electorate for the next general -elections scheduled for October 1979.

It is not clear how a voter's right will be affected if a member of his family happens to be an agnostic or follows any other faith. President Zia-ul-Haq issued orders that with immediate effect all official and semi-official correspondence would begin in the name of Allah.

The Urdu daily, *Musiwaat* reported that the police, with the help of Jammat-i-Islami and volunteers of the Pakistan National Alliance, had started making a list of people who did not believe in God and the Prophet. The people mentioned in the list were called to a police station where, in the presence of a magistrate, they were to reply to questions like "are you a communist?" "Do you believe in God and the Prophet?" "What is your connection with the Pakistan People's Party?"[20]

The Constitution (Amendment) Order, 1979 was issued by the President to

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[20] *Times of India,* October 9, 1978.

amend the Constitution so as to confer on the High Courts, the power to decide whether any law was repugnant to the injunctions of Islam and to provide that a law declared by a High Court to be so repugnant shall cease to have effect on the day on which the decision of the High Court becomes effective.[21]

President Zia-ul-Haq announced at a special ceremony in Islamabad on February 10, 1979, the enforcement of 'Nizame Islam'[22] by promulgating with immediate effect Islamic Laws for all the offences which are subject to *hadood, viz.,* intoxication, theft, *Zina,* and *Qazf* (imputation of Zina) and promising to introduce *Zakat* from July 1, 1979, *Ushr* from October 1979 and the interest-free system in State to be completed in three years.[23]

[21] *Pakistan Times,* February 9, 1979.
[22] *Nay Bharat Times,* February 11, 1979 and *Dawn,* February 11, 1979.
[23] *Dawn,* February 11, 1979.

Behind the Bars

To be worth anything character must
be capable of standing firm upon its
feet in the world of daily temptation,
work and trials.

Smiles

Besides the sensational murder case involving Mr. Zulfikar Ali Bhutto, dealt with elsewhere in this book, there was another important case in Pakistan. This began in the Supreme Court itself. It was initiated by Begum Nusrat Bhutto, wife of Mr. Zulfikar Ali Bhutto. This was a *Habeas Corpus* petition under Article 184(3) of the Pakistan Constitution of 1973. It was filed shortly after the arrest of Mr. Bhutto on 17-9-77 along regulations with 10 of his companions of the Pakistan People's Party (PPP) under Martial Law. Mr. Bhutto's companions were:

From the Punjab four, namely,
(1) Sheikh Mohmmad. Rashid, Vice-Chairman, PPP;
(2) Dr. Ghulam Hussain, Secretary General of PPP;
(3) Mr. Khalid Malik, Secretary General of PPP, Punjab branch;
(4) Mr. Hayat Mohammad. Khan Taman.

From Sindh two
(5) Mr. Abdul Hafiz Peerzada; and
(6) Mr. Mumtaz Ali Bhutto.

From Baluchistan
(7) Mr. Ghaus Bux Rasisani.

From the N.W.E.P. three, namely,
(8) Mr. Iqbal Mohammad Jadoon;
(9) Mr. Nasrulla Khan Khattak; and
(10)Mr. Humayun Seifullah Khan.

In this petition Gen. Zia-ul-Haq was the principal respondent. This main issue here was the constitutionality of Gen. Zia-ul-Haq's military coup of 51h July, 1977 and the ensuing changes in the laws enabling the arrest and detention of Mr. Bhutto and his ten companions under Martial Law Regulations.

Admitting the petition by an interim order of 20th September, 1977, the Supreme Court directed that the 11 detenus be brought to Rawalpindi and kept in

the Sihala Rest House where they could be summoned by the Court whenever required. They were not to be removed there from except with the permission of the Court during the proceedings. Counsel for Mr. Bhutto was Mr. Yahya Bhaktiar, former Attorney General, assisted by Mr. D.M. Awan and Mr. Ghulam Ali Memon. Counsel for the respondent regime of the Federation of Pakistan was Mr. A.K. Brohi. Mr. Sharifuddin Prizada, Attorney General of Pakistan appeared as Law Officer to assist the Court.

A seven judge Bench admitted the petition for hearing presided over by Mr. Mohd. Yakub Ali, Chief Justice. The final decision was given by the Bench of nine judges composed of Sayeed Anwarul Hag who succeeded Mr. Yakub Ali as Chief Justice, Mr. Justice Waheedud-din Ahmed, Mr. Justice Mohd. Akram, Mr. Justice Darab Patel, Mr. Justice Mohd. Haleem, Mr. Justice Safdar Shah, Mr. Justice Qaisar Khan, Mr. Justice Naseem Hasan Shah and Mr. Justice Afzal Cheema.

The judicial finality of these proceedings of the Supreme Court is, perhaps, questionable because they were seeking to assess the constitutional validity of Gen. Zia-ul-Haq's claim to rule at a time when Gen. Zia-ul-Haq was in effective military control of the entire country and when physically the Supreme Court itself was his captive. Upon Gen. Zia-ul-Haq taking control of the country, at very short notice without any opportunity for judicial deliberation, the Judges of the Supreme Court and the High Courts had been put to a fresh oath of office and fealty to the new Regime under a provision that those who fail, within 24 hours, to take this new oath shall cease to hold office. In his judgment in these proceedings Chief Justice Anwar-ul-Haq says that "taking of the fresh oath by the Judges of this court does not in any way preclude them from examining the question of the validity of the new legal order and from deciding the same in accordance with their conscience and the law". The value of these brave words must be assessed with reference to the judicial performance of the Court.

An examination of these proceedings is useful because in the first place they reflect the crisis of conscience that confronted Pakistan's judiciary and throw light on the political issues facing the people. Secondly, these proceedings contain erudite discussion of the juristic character and consequence of abrupt political change. Thirdly these proceedings help us to weigh for ourselves the claim of legitimacy made on behalf of Gen. Zia-ul-Haq for his admittedly extra constitutional actions, namely his initial take over of the Government, ostensibly on the plea of holding fair and free elections, and for his continuance in power after postponing elections. Fourthly, petitions and affidavits filled by the various parties in these proceedings contain an account of many matters in controversy between the supporters and opponents of Mr. Bhutto. Some of these controversies were relevant to the petition before the Court. Even those not so relevant are instructive for students of events.

Some facts were admitted by both parties. Others were hotly disputed. The court took judicial notice of a number of facts, disputed by Begum Nusrat Bhutto and her husband and the other detenus, in favour of the Regime. On these it has based its decision. Whether the Court was justified in so doing is now open to public judgment.

In particular, the assumption by the Court of the political immaculacy of the "anti Bhutto" agitation that spread from "Karachi to Khyber" after 7th March, 1977 may require further scrutiny. Was this a spontaneous movement of the people or was there some hidden hand of a "Super Puppetter" behind it'? Was the Court justified in declining to examine in depth the issue raised by the Regime's claim that the talks between Mr. Bhutto and the PNA had irretrievably broken down at the time of the coup against Mr. Bhutto's contention that agreement was in sight which the coup sought to forestall?

Also, the soundness of the doctrine, propounded by the Supreme Court, under the head of necessity, that a public tumult, widespread and sustained, can justify, in law, an Army Coup, required examination. Was Gen. Zia a selfless Cincinnatus or an over ambitious Caesar?

Some of the most important unanswered questions will be summarized in the last chapter of this book.

Although the Court ultimately dismissed Begum Nusrat Bhutto's petition, the majority of 8-1 led by the Chief Justice refused to give to the military regime the *carte blanche* it asked for.

While affixing its seal of legality to Gen. Zia's "temporary regime" as a caretaker only, from 5th July, 1977 (the date of the takeover) till 10th November, 1977 (the date of the judgment) under the doctrine of 'necessity,' as understood by the Court and as applied to the situation prevailing in Pakistan, the overwhelming majority of the Court affirmed that the Constitution of 1973 was not abrogated, nor superseded, that only a "temporary deviation" in respect of some of its provisions was being allowed and that the Supreme Court and the High Courts retained their plenary jurisdiction, under the original Constitution of 1973, to strike down, in future, any acts of the Martial Law Regime that exceeded the limits of action justified by necessity (as explained by the Court) and which were not, substantially, directed to the declared aim of holding free and fair elections at the earliest practicable date for handing over power to a representative Government.

These observations of the Court are pregnant with future difficulties for the Martial Law Regime particularly if the public mood in Pakistan changes. The political and social catharsis engendered by the courageous death of Mr. Bhutto

at the hands of the Regime may well precipitate such change.

Begum Nusrat Bhutto's petition comprises about 6000 words and raises, as earlier mentioned, the fundamental issue of the legality of the military regime. In her petition Begum Bhutto contends that the conduct of the Army Chief had frustrated his ostensible aim of holding free, fair and impartial elections and of transferring power to the elected representatives of the people. She said that it is impossible to hold free, fair and impartial elections, when the Chairman and prominent leaders of the premier political party of the country had been arrested and put behind bars. She claimed that the Army Chief had gone back on his public pronouncements that he would not take any action against the Chairman of the Pakistan People's Party under the Martial Law Regulations. He went back on this, Begum Bhutto alleged, after it became clear to him that the Pakistan People's Party was bound to sweep the polls at the General Elections. The petition states that the Chairman and other leaders of the Pakistan People's Party, in good faith and in the larger interests of the country and its integrity and solidarity, had been trying to co-operate with the military regime so that free and fair elections could be held and power transferred at the earliest to the chosen representatives of the people. This they did in spite of the smear campaign unleashed against the Chairman and the leaders of the Pakistan People's Party by the *de facto* Government of Pakistan through the official media and the press in the name of freedom of opinion and expression. But it was now obvious, Begum Bhutto claimed, that the respondent, having failed to influence public opinion against Pakistan People's Party Chairman had no intention whatsoever to transfer power to the people's representatives as earlier promised. Begum Bhutto's petition goes on to say that the *mala fides* of the respondent are obvious from the fact that only the leaders of the Pakistan People's Party had been selected for victimization. The object was clearly to paralyze that party so that it may not be able effectively to participate in the elections.

The partiality of the respondent was also clear from the fact that none of the candidates belonging to the PNA had been selected for the purpose of the accountability exercise although some of them had been in power during the past five and a half years and had notoriously indulged in corruption and malpractices.

Begum Bhutto, therefore, prayed that the court may direct that Mr. Zulfikar Ali Bhutto and other detenus named be brought before the Court, that the Court may satisfy itself of their being held in custody without lawful authority and may order that they be set at liberty. In response to the Court's direction, Mr. A. K. Brohi filed a 31 pages written statement on behalf of the regime. Mr. Brohi said that the written statement was being filed without prejudice to the contention of the regime that the Court may first determine the question of its jurisdiction before embarking upon an enquiry into the merits of the case. The regime

challenged the Court's jurisdiction.

The written statement sets out, in over 50 paragraphs, the events that, according to Gen. Zia-ul-Haq, led to Martial Law. The statement says that these events fall into two "Phases". The first "phase" relates to alleged unconstitutional and illegal Government of this country by Mr. Bhutto and his associates for fomenting civil strife within the country and their intention to frustrate and prevent holding of free and fair elections. This second "phase" was the justification put forth for the prolongation of the Martial Law Regime. Elaborating the "first phase", the written statement, filed on behalf of the regime, reads as follows:

"That in the interregnum between 7th March to 5th July 1977 the alliance dialogue between the Pakistan People's Party (PPP) and the Pakistan National (P.N.A.), which had been prolonged by Mr. Bhutto for his own *inala.fide* purpose had reached an impasse; that the nation had reached a critical juncture; that the spectre of civil war loomed ahead, that the necessity for the Army to act had become imperative; that it was clear beyond doubt that no possibility existed of fair and free elections being held so long as levers of power remained in Mr. Bhutto's hands; that the general recognition of this fact had led to widespread public demands that the Army should accept the responsibility for the holding of elections; that in the above circumstances Martial Law was proclaimed on 5th July, 1977 and was greeted with a sigh of relief throughout the country. **In** the three months since the imposition of Martial Law peace and quiet had been restored."

The written statement then claims that the Chief Martial Law Administrator had been compelled to postpone elections because of the necessity to enforce accountability of politicians to the public as a prerequisite of effective exercise of the franchise. For the purpose, a number of cases have been referred to the Courts. In this connection the Chief Martial Law Administrator has appealed for expeditious disposal of pending cases, that thus it can be seen that the Marital Law was imposed not in order to displace the constitutional authority but in order to provide a bridge to enable the country to return to the path of constitutional rule. The doctrine of necessity is, thus, fully applicable to the facts and circumstances of the case.

In response to his written statement Mr. Yahya Bakhtiar filed a 12 page rejoinder on behalf of Begum Nusrat Bhutto along with one 125 page statement by Mr. Zulfikar Ali Bhutto.

The rejoinder reiterated that the Supreme Court did have jurisdiction to hear the petition, and the Chief of Army Staff being the functionary appointed under the Constitution of 1973 had no power to change that Constitution which he had

solemnly sworn to uphold.

The Chief Justice (now Mr. Anwar-ul-Haq) indicated that it was the consensus of the court that the detenus Mr. Zulfikar Ali Bhutto and Mr. Abdual Hafeez Peerzada be allowed to appear before the Court.

In the course of Mr. Yahya's rejoinder filed on behalf of Begum Nusrat Bhutto it was asserted that the validity of Martial Law Order No. 12 issued by the Chief Martial Law Administrator could be examined by this Court and is liable to be declared *ultra vices.* Provisions of the said order amount to subversion of the Constitution of 1973 and these orders as well as the proclamation of law come within the mischief of Article 6 of the Constitution of 1973, that is to say the offence of high treason. The rejoinder states that the Chief Martial Law Administrator is subject to the jurisdiction of the Supreme Court like any other citizen of this country. The rejoinder refutes the interpretation put on certain expressions of Mr. Zulfikar Ali Bhutto and denies that Mr. Bhutto had ever said that he would create a crisis of jurisprudence. Mr. Bhutto had merely said that this arrest and detention on false and malicious charges would lead to such as situation. It challenges the claim made by the Chief Martial Law Administrator that the present is a transitional phase which is intended to restore normal constitutional procedures and orderly process of transfer of power to the duly elected representatives of the people. The rejoinder alleged that the Chief of the Army Staff had no intention whatsoever to transfer power to the representatives of the people. This has become apparent from the indefinite postponement of elections scheduled for 18th October, 1977. The rejoinder states that never before has a person holding such a high office gone back in such a short time on his solemn commitments pronounced so repeatedly on so many occasions. In the first instance the respondents had stated that this takeover of the administration is only for 90 days. As the 90th day approached, on flimsy grounds without any justification whatsoever he postponed the general elections so that he may continue indefinitely in power. Thereafter, his regime launched upon a large scale witch-hunt, started taking decisions which were not the business of any Interim Government, started planning long term projects which could materialize only after many years. His latest stand is that before elections the candidates who wish to contest the elections should be thoroughly screened. To begin with he has started cases in the law Courts against the top Pakistan People's Party leaders. When these are concluded he would probably start the same exercise against PNA on the excuse that he would not like to discriminate. This process of accountability is likely to take years and there could be no end to it. The question of accountability has been brought out only with a view to perpetuating the regime. The rejoinder goes on to mention many other inconsistencies of Gen. Zia-ul-Haq. Gen. Zia-ul-Haq's earlier testimonials to Mr. Bhutto are also mentioned including the statement of Gen. Zia-ul-Haq reported in the *Pakistan Times* of 14th July 1977 after the coup which reads as follows:

"The Chief Martial Law Administrator said the Army had solid evidence that there has been large scale rigging in some constituencies; but he discounted the allegation that elections in all the constituencies have been rigged. He said that the army also has evidence that Mr. Bhutto was not responsible for rigging. Moreover, it was wrong to say that Pakistan People's Party victory was due to rigging; the party would have won even if there was no rigging. It was not Mr. Bhutto who rigged the elections but his subordinates and the administrative staff who wanted to show their loyalty."

This was very different from the stand that Gen. Zia-ul-Haq was now taking. In the end the rejoinder states that under the Constitution no duty is imposed upon the Chief of the Army to ensure stability and integrity of the State on his own initiative. He has to defend the country from external aggression and internal disturbances under the orders of the Federal Government because the command and control of the armed forces vests in the Federal Government under Article 223 of the Constitution. The Chief of Army Staff, who destroyed the existing national legal order, cannot claim to be ensuring peaceful and orderly transition to normal constitutional procedures. Similar ostensibly laudable objectives were put forward by Gen. Mohammad Yahya Khan, and late Premier Gen. Sikander Mirza when they imposed Martial Law in the country. The rejoinder goes on to deny that it was because Mr. Bhutto's government was unconstitutional or illegal that Martial Law was imposed to remove him from office. On the contrary, the Chief of the Army Staff in his statement published on 28th April, 1977 had admitted that the Government of Mr. Zulfikar Ali Bhutto after 7th March, 1977 elections was a legally constituted government. Even after the takeover he had reaffirmed this position. As already stated he did not hold Mr. Bhutto responsible for rigging the elections; he said that the People's Party would have won the elections in any case. The doctrine of necessity for imposing the Martial Law is untenable. It is fantastic to suggest that all organs of the State should accept the imposition of Martial Law and recognize it as organic law of the State. That would amount to a standing invitation to military adventurers and the constitutional history of this country would become merely a game of snakes and ladders. Finally, the jurisdiction of the Court to hear the petition is affirmed.

Then there is a further rejoinder filed on behalf of Mr. Zulfikar Ali Bhutto himself. It is a lengthy document running into 60 pages, considerable portion of which is devoted to defending Mr. Bhutto's government and Mr. Bhutto personally against the charges that were levied, in the written statement filed on behalf of the regime. Mr. Bhutto has alleged that there was no proper emergency of the type claimed by Gen. Zia-ul-Haq for imposition of Martial Law. In the interim period while negotiations between the Pakistan People's Party government and the PNA were going on the Army was asked to help the civil power under Article 245 of the Constitution. The respondent, Gen. Zia-ul-Haq,

had deliberately executed a *'langra lula'* Martial Law to create conditions for his illegal and unconstitutional intervention. The statement goes on to say that on 5th July, 1977, the respondent had admitted that he had carried out a *'langra lula'* Martial Law and not come with clean hands to the aid of the civil power as he was required to do under Article 245 of the Constitution. The respondent deliberately fanned the agitation by clandestinely assisting in the "Operation Wheel Jam."

This was confirmed by reports in various foreign journals like the *Far Eastern Economic Review.* In his speech in the National Assembly on 28th, April Mr. Bhutto had stated that the "Operation Wheel Jam" was a contingency plan of the Army which was introduced with the help of American advisers for dealing with civil commotion against a "hostile Government" in power. Gen. Zia-ul-Haq played as prominent part in encouraging, aiding and manipulating events, to exasperate civil strife in order to overthrow the legal government at the time of his choosing, Mr. Bhutto alleged. The respondent was the artist and architect of the mosaic of events within the country in the critical months of April, May, June and July, 1977. Had the respondent cooperated sincerely and patriotically with the Prime Minister of the Federal Government, which under the Constitution is vested with the control and command of the Army, much of the bloodshed and much of the damage to the private property which was mentioned in the written statement would have been avoided. The respondent cannot, therefore, plead the doctrine of necessity as it is untenable in law and untenable on facts On the basis of necessity the Chief of the Army staff cannot justify his coup or his taking over administration of the country as a usurper. On the basis of "necessity" the respondent cannot nullify the will of the people as embodied in the Constitution, which he had solemnly sworn to uphold, and to impose his own will on the people and the national institutions and authorities, which clearly comes under the mischief of Article 6 of the Constitution and amounts to high treason. If the argument for the continuance in power of the respondent were accepted, then every usurper in control of the colossal power of the State would be able to advance grounds of necessity for dislodging a duly constituted civilian government on the basis of some alleged irregular or illegal .acts. Mr. Bhutto goes on to say that there is no weight in the claim that the government was unconstitutional or illegal. It had been the legal constitutional government and this has been admitted by the respondent. At no time and under no circumstances, Mr. Bhutto says, did his government seek to frustrate or prevent the holding of free and fair elections in order to consolidate their continuity in office? For the sake of argument even if he were to concede this false charge, he would like to know how he could have been able to consolidate the illegal continuity of the office of his government by inciting civil war and bloodshed. Consolidation does not come by creating chaos and instability. His Government is interested in the sanctity of the Constitution and not in its destruction. A Government cannot legalize itself by unleashing and trying to unleash a civil war or by endangering

the Constitution. One is the antethesis of the other. On the face of it the assertion is false and absurd. Mr. Bhutto says that ever since the establishments of Pakistan, the elections of March, 1977 were the high watermark of Pakistan's, democratic progress as they were the first general elections in the *30* years' chequered history of Pakistan to be held by a civilian Government. Under the terms of the Constitution during the emergency, general elections could have been postponed by a year till August, 1978. His Government under the Constitution did promote the democratic stability and did establish democratic traditions **in** Pakistan for the first time in its tumultuous history. Mr. Bhutto points out that there were no national elections during the premierships of Mr. Liaqat Ali Khan, Khwaja Nizaimud-din, Mr. Mohammad Ali, Mr. H. S. Sohravardy and Mr. Feroz Khan Noon. No national election had been held during the tenure of any of the civil Prime Ministers of Pakistan from 1947 to 1958. Only provincial elections in the Punjab, Sindh, the N.W.F.P. and East Pakistan were conducted, but not in Baluchistan, the fifth province.

Mr. Bhutto challenges para. 5 of the written statement filed on behalf of the Regime stating that this was an afterthought to justify the illegal takeover of administration of the country by the Chief of Army Staff. In his first statement made on the 5th July, 1977, giving reasons for imposition of Martial Law, Gen. Zia said:

"I would like to point out here that I saw no prospect of a compromise between PPP and PNA because of their mutual distrust and lack of faith. It was feared that the failure of the PNA and PPP to reach a compromise would throw the country into chaos and the country would thus be plunged into a more serious crisis. This risk could not be taken in view of the high interests of the country .... The Army had therefore to act as a result of which the government of Mr. Bhutto ceased to exist throughout the country: the national and provincial assemblies have been dissolved and the provincial Governors have been removed."

Mr. Bhutto points out that in this statement the reference is to future events that were apprehended, but not due to alleged past illegalities and irregularities of the former government upon which the Regime now seeks to base its case. Mr. Bhutto goes on to point out that two days before, the respondent abruptly and without good reasons postponed the elections due on 10th October, 1977.

The Secretary General of the Ministry of Foreign Affairs told the General Assembly of the United Nations, categorically that the respondent Gen. Zia-ul-Haq was determined to hold elections on 10th October and to transfer power to a civilian government. Mr. Bhutto asks, what was the purpose of making such a solemn commitment before the forum of the whole world when immediately thereafter the respondent was to announce that he had made false

promises to the people of Pakistan and in the process also deceived the whole world. Mr. Bhutto asks, why did the respondent, Gen. Zia-ul-Haq, compromise national interests by taking such a disastrous decision of postponing the elections? Why did he belittle Pakistan in the eyes of the whole world and belittle himself in the eyes of the people of Pakistan? He did so, said Mr. Bhutto, because all his assumptions fell to the ground and all his premises were upset by the will of the people. He took the perilous step because he now saw that despite measures taken against the premier party of the people, elections were going to result in a massive victory for the Pakistan People's Party. There is no other reason or explanation for such want of betrayal. The pledge given on the 5th of July, 1977 was to hold elections within 90 days. The respondent made this pledge and commitment categorically and without qualification. He promised to restore democracy and civil supremacy within 90 days. He called it operation "fair play". He told the Nation in clear terms that the elections would be free fair and that his Martial Law Administration would be impartial. He assured the people of Pakistan that the Constitution was *safe – 'Mehfooz'*. It was only held temporarily in abeyance and suspension. The respondent made it clear that there would be no witch-hunt or persecution of political leaders. He admitted that it was for the people to elect their leaders. It was for the people to reject or honour their leaders and try to exercise their votes. The actual position has been the opposite. The respondent had started his spiteful vendetta against the PPP and its leadership. He made crude attempts to destroy the PPP. He has arrested arbitrarily PPP candidates for the national and provincial assemblies. The jails of Pakistan are full of PPP workers. The Television and Radio and the Opposition Press has been directed to indulge in the worst form of character assassination of the PPP and its leadership. The respondent has indulged in the quintessence of "Rigging" by the illegal steps he has taken to eliminate the leadership of the PPP ever since he announced that he would hold impartial elections. None of the respondent's measures stemmed the high tide of Pakistan People's Party, not even the crises of jurisprudence created after the petition of his (Bhutto's) wife was admitted by the Supreme Court on 20th September, 1977. It does not lie in the mouth of Gen. Zia-ul-Haq to say that there was a master plan for the rigging of the elections which had been conceived, directed by the Prime Minister Zulfikar Ali Bhutto. This is an afterthought to justify his imposition of Martial Law and to perpetuate his illegal regime. Mr. Bhutto repeats the admission by Gen. Zia on 14th July, exonerating him (Mr. Bhutto) from the charge of rigging (earlier set out).

Referring to Gen. Zia, Mr. Bhutto states, "Never before in the history of public institutions" has a person holding such a high office gone back so often on so many of his solemn pronouncements.

Mr. Bhutto denies that he ever utilized Pakistan Embassies for importing luxurious items for his personal use or for that of members of his family.

Mr. Bhutto repudiates the suggestion that the Federal Security Force was a private militia.

Proceeding, Mr. Bhutto objected to the respondent's reference to the case of Ahmad Raza Kasuri's father in the context of the Federal Security Force. Mr. Bhutto also complains that the respondent had made several statements about that case to subvert the course of justice. In particular, Gen. Zia had told foreign journalists, that he had documentary evidence in support of his charge that Mr. Bhutto had murdered Kasuri's father. His statement had been published in Pakistan and throughout the world while the murder case was pending before the High Court. No such documentary evidence was, however, produced by the prosecutor before the Court trying that case.

Mr. Bhutto then deals with certain individual cases. He goes on to refer to the question of Bangladesh and denies that he destroyed any material relating to interrogations of Mr. Mujibur Rahman. He asserts that a tape-recording of Mr. Bhutto's two very important conversations with Mr. Mujibur Rahman in December, 1971 and January, 1972 are with the intelligence agencies. Mr. Bhutto says that all his dealings with Mr. Mujibur Rahman were based on considerations of foreign policy and on the advice of the foreign office. The official attitude towards Mujibur Rahman, who by that time had become the Prime Minister of Bangladesh, rested on the objectives of our State. If the objective was to have good relations with Bangladesh and draw closer to it, it follows that it was necessary to have correct relations with Mr. Mujibur Rahman who was at that time a national hero of Bangladesh. If, on the other hand, the policy was to alienate Bangladesh, to make it an enemy of Pakistan, the attitude to the Prime Minister of that country would have been different. No personal considerations were involved. Mr. Bhutto was dealing with the Prime Minister of a country which until recently had been a province of Pakistan. "Dealing with such a delicate problem I had to adopt a sensible and far sighted approach." Mr. Bhutto claimed "With the passage of time my policy on Mr. Mujibur Rahman and Bangladesh has been vindicated. Now it can be said that all and sundry I pursued the correct policy towards Bangladesh. The respondent is reaping the benefits. If I had pursued any other policy it would not have been possible for the respondent to invite a high-powered delegation from Bangladesh, to hold discussions on how we can come close to one another, nor would it have been possible for the Foreign Minister of Bangladesh to say in the current session of the U.N. General Assembly, only a few days ago, that it was the earnest wish of Bangladesh to have closer ties with Pakistan. These positive and welcome results flow from the policy which I laid down towards Bangladesh and her leaders from the time I took over office as President of Pakistan. Instead of expressing gratitude to me, the written statement carries items of frenzied criticism even in such matters." Mr. Bhutto complained.

At the conclusion of his arguments on behalf of the Federation of Pakistan, Mr. A. K. Brohi was permitted on October 26th to file in the Supreme Court yet another document purporting to be a 14 page Reply of the points raised by Mr. Bhutto and Mr. Peerzada. Mr. Brohi also attached photostat copies of documents purporting to show certain grave irregularities and misuse of power committed by the former Prime Minister while be held the reins of office. This document is being summarized here although in point of time it comes after the arguments of Counsel. How far it was proper for the Supreme Court to permit such a procedure without giving a further right of reply to the detenus is for the reader to judge.

Contradicting the allegations made in the rejoinder and also in the verbal statements made by Mr. Bhutto, Mr. Brohi in his final document in Reply stated that while in office Mr. Bhutto had been behaving as if Pakistan was his *Jagir.* The summary of the Reply follows. The first point made in this Reply is that the Laws (Continuance in Force) Order, 1977 is the supreme constitutional instrument of Pakistan and all laws presently in force derive their existence from and are subject thereto. Mr. Brohi said that Order cannot be challenged and, therefore, the prayer was made to the Court to proceed to determine the question of jurisdiction before embarking on a wider enquiry in the matter. Secondly, during the course of arguments legal questions relating to the applicability of the doctrine of necessity were raised, certain broad trends of events which are prevalent in the country were touched upon in their historical context of which the Court was invited to take judicial notice. Only certain specific events were described merely to illustrate the overall pattern by means of specific instances. There was no attempt to embark upon a detailed factual enquiry because that would be outside the scope of these proceedings. In the rejoinder submitted by Mr. Zulfikar Ali Bhutto and the oral statement he made in the Court certain mischievous allegations have been leveled. With a view to keeping the record straight the Federation of Pakistan contradicts the allegations made in the rejoinder and also the verbal statements made by Mr. Zulfikar Ali Bhutto and the same applies to certain incorrect and baseless allegations made by Mr. Abdul Hafeez Peerzada in his statement before the Court. All these allegations are denied.

The document proceeds to deal with certain specific allegations. The statement of 28th April, 1977 by the Chairman of the Joint Chiefs of Staff Committee, the Chief of the Army Staff, Chief of Naval Staff and Chief of the Air Staff supporting the Government of Mr. Bhutto as they considered it the constitutional government, was sought to be explained by saying that it merely indicated that the Armed Forces did not wish to interfere in the political affairs of the country and had given their full support to the Government. It was further said that the statements were made on the basis of information made available by the Government. That the Chiefs of the Armed Forces are not experts in constitutional law.

It was argued that if one of them was striving to create a situation to take over the country's administration (as is now alleged) he or they would not have given unqualified support to the Government during the PNA's agitation.

Further it was wrong on the part of Mr. Bhutto to allege that the Chief of the Army was either specially interested in the trial of the case in Hyderabad Special Tribunal or that he was unwilling to withdraw the Armed Forces to the barracks in Baluchistan.

It was the former Prime Minister, who, using all the agencies available to procure evidence against the persons involved in the Hyderabad Conspiracy Case, had indulged in activities prejudicial to the interests of the country. The Armed Forces as such did not at any time conduct any such enquiry or investigation.

The Armed Forces in conformity with their traditions had held aloof from politics and they had no direct contact with any of the political leaders in the country. The governmental agencies were the sole sources of information.

It was only after the 5th of July, 1977 that the real magnitude of the problem became known to the Armed Forces, who became for the first time aware that the information supplied to them was not free from bias and slant.

In these circumstances the Army's professional role was based on the quality of information supplied by the Government and if the information provided was coloured or inadequate the fault did plot lie with the defence services.

The statement goes on to say that the allegation that the Chief of the Army Staff obstructed the progress of the PPP and PNA's negotiations is totally false. The PNA's view point was not known to the Army except for such reports as appeared in the press. The Government PNA dialogue was carried on in extreme secrecy.

The allegation that the "Operation Wheel Jam" was one of the contingency plans of the Army and was put into operation was denied as a sheer fabrication. The Army had no such plan. That the Armed Forces responded to the call of the Government in April 1977 to come to the aid of the civil power. All ranks of the Army notwithstanding their status carried out their duty without any reservation. The courage, determination, devotion showed by them in the face of heavy odds was commendable. In this connection, Mr. Bhutto's appreciation is also cited.

The statement goes on to say that in his address to the Nation on 1-10-1977 the Chief Martial Law Administrator has referred to the reasons that had contributed

to his decision for postponing the elections. According to him the process of accountability to the Civil Courts and Tribunals should have precedence over the programme of holding elections on 18th October, 1977. This step was taken in response to the persistent demand of the people and the political leaders.

From the perusal of the documents it would be abundantly clear that there was every justification for the Chief Martial Law Administrator to postpone the elections in the interests of the Nation so that the process of accountability should have precedence over the desire to keep to the previously announced elections. The electorate was entitled to be apprised of the true faces of the politicians. This was considered very essential to avoid the repetition of another catastrophe. The statement also claims that the postponement of the elections was acclaimed by the national press and the political leaders.

The statement goes on to explain the differing stands taken in the various statements of the Chief Martial Law Administrator. Regarding the situation at the time of takeover the statement goes on to say that the political situation was then such that further prolongation of this "dialogue of the dead and dumb" would have reached the critical point where after it would have contributed to the stage of widespread disturbances and indeed fires would have raged so that no fire brigade available in Pakistan would have been able to extinguish the flames.

It may be noticed that in this statement no specific denial appears to have been made on behalf of General Zia-ul-Haq of the allegations made (in paragraph 35 of) Mr. Bhutto's Rejoinder (earlier set out) that the Chief Martial Law Administrator, Gen. Zia-ul-Haq, had told foreign journalists that Mr. Bhutto had murdered Kasuri's father, that he, Gen. Zia-ul-Haq, had documentary evidence in support of this. This point has a very serious bearing on Mr. Bhutto's trial for murder, dealt with elsewhere in this book. It appears that no such documentary evidence was produced at the trial to implicate Mr. Bhutto in the Kasuri murder. The questions must be asked that if Gen. Zia-Ul-Haq had this information, then why it was never produced. If he never had it in his possession, then his statement that he had such material in his possession was one that would very seriously prejudice a fair trial.

Mr. Bhutto says that the vital question was not his unopposed election in March, 1977. The vital question is credibility. Nobody would think it incredible to Mr. Bhutto to get elected unopposed, but who would place any credibility on the respondent, Gen. Zia-ul-Haq.

In no less than 3 months how many times he has contradicted him self. The keynote was the promised elections that are being postponed to the detriment of the nation. The respondent by abruptly postponing the elections has jeopardized the national unity. Why he should betray the national interest and solidarity, Mr.

Bhutto asks. The pledge given on 5th of July, 1977 was to hold elections within 90 days. It emphasised that there would be no witch-hunt of political leaders. It conceded that it was for the people to select their leaders. And now the respondent has started his spiteful vendetta against the Pakistan People's Party and its leadership. He has made crude attempts to destroy Pakistan People's Party. He has arbitrarily arrested Pakistan People's Party candidates for the national and provincial assemblies. The jails of Pakistan are full of Pakistan People's Party workers; he has had Pakistan People's Party workers lashed including a former senator. He has awarded summary punishment to Pakistan People's Party workers through his Military Courts. The respondent has stopped at nothing.

While the opposition parties were encouraged to vilify and abuse the Chairman of the Pakistan People's Party and his associates in the foulest of the language, the respondent saw it fit to warn the wife of the Pakistan People's Party Chairman, put his young daughter under the ambit of the Martial Law Order No. 12 for allegedly making militant speeches. Neither of them had made militant speeches, but the respondent's fur:!, fell on these two women only.

Referring to his own trial before the High Court, Mr. Bhutto says that from the way the trial is being conducted post-haste by a Bench presided over by Mr. Justice Mushtaq Ahmad, who by his word and deed has demonstrated that he is out to avenge his supersession, it appears that he will not get a fair trial.

The constitutional and legal objections raised by Mr. Bhutto had been dismissed *in limine* for reasons which are yet to be given. Even certain copies of the High Court's orders are not being issued to disable Mr. Bhutto from pursuing his remedies in the Supreme Court, he alleged.

Replying to the allegations of rigging in substance means subverting the verdict of the electorate by dubious means. It means frustrating the choice of the electorate by manipulation. The last three months' activities of the respondent have been a manipulation to frustrate the choice of the people. There is no need to stock the ballot papers if the whole party or its leadership is put out of the way by imprisonment and contrived disqualifications. The respondent himself has indulged in the quintessence of rigging by all the illegal steps he has taken to eliminate the leaders of Pakistan People's Party ever since he made the announcement to hold "impartial" elections. None of the respondent's measures stemmed the high tide of the Pakistan People's Party, not even the crises of jurisprudence he created after Begum Nusrat Bhutto's was admitted by the Supreme Court on 20th September, 1977; that in sheer desperation the respondent postponed the elections without giving another date for them.

The respondent gave the worst reasons for swallowing his solemn words, Mr.

Bhutto said. The respondent was so bold as to declare that "the elections would be held after Mr. Bhutto's fate is decided." He has ordered the whole Nation to come to a standstill in order to punish Mr. Bhutto. It is tragic that about 75 million people should be punished over the threat to punish first only one individual.

The respondent had also stated that there might have been trouble. Actually there was no trouble and surely existing martial law was sufficient, well equipped to deal with trouble.

Later it was stated that the authorities have information that the Pakistan People's Party was going to start trouble on 10th October, a week before the elections; that Pakistan People's Party leadership was not totally cut off from the scene.

The Pakistan People's Party was going to win the elections and had, therefore, no reason to create trouble.

Besides, even the wife of the Prime Minister and his young daughter, with some other leaders who had not yet been arrested were hardly in a position to create any trouble, neither did they have any such plans.

Hence, there was no valid reason to postpone the elections except to perpetuate the respondent's one-man rule.

For this perpetuation the respondent was willing to tear up the 12 page Constitution and to punish the people by denying them their unalienable rights and to create a political vacuum that may yet be fatal for the very existence of the country.

Mr. Bhutto proceeds to state that the need of the hour is to fulfill the promise for General Election and not to wriggle out of this unalterable commitment. It is no use making a fetish of the trial of the Chairman of the Pakistan People's Party and his associates. There is no point in insulting the basic intelligence of the people by way of sickening them with fairy tales.

The statement then deals with the remarks attributed to the Chief Election Commissioner. Mr. Bhutto says that the then Chief Election Commissioner made no official report to the Government of the matters alleged by the respondent. If there had been widespread irregularities, it was his duty to inform the Government.

Furthermore, the Hon'ble man who occupied an independent position under the Constitution as he did should have gone through the formality of tendering his resignation. The Opposition demanded his resignation but he did not tender it.

He did not resign because according to him his conscience was clear and he was satisfied with the results of the elections conducted under his direct supervision.

The statement then refers to an alleged report in the daily *Millat* of Karachi and states that the then Chief Election Commissioner denied point blank any responsibility for what was ascribed to him by the said newspaper of Karachi.

The then Chief Election Commissioner carried on his duties until he became unwell when he sought the Government's permission to go to Europe for treatment. The permission was granted to him according to his entitlement.

Mr. Bhutto then alleges that immediately after the elections of 7th March, 1977, even before the 5th July, 1977, the date of the takeover, the respondent was surreptitiously fabricating information about so-called rigging to pave the way for his illegal intervention. Details are given of this.

Mr. Bhutto mentions reports that he had received from various Chief Ministers regarding surreptitious enquiries being made by Army personnel in a hush hush manner.

Proceeding, Mr. Bhutto said that there was nothing illegal in giving motor-cycles and bicycles to Pakistan People's Party's workers at the expense of the Party.

Mr. Bhutto asserts that Pakistan is a republic with a Constitution. It has a fairly sound and well established administration which functions efficiently. It is not a Banana republic, although strenuous efforts are being made to convert it into a Banana republic.

Mr. Bhutto then explains certain remarks made by him wherein he had asked that presiding officer should be thoroughly dependable. He says he meant that they should not be merely tools of the ruling party, that they should be men of integrity, individuals who would not be susceptible to corruption. They had to be thoroughly dependable to ensure free and fair elections.

Mr. Bhutto refutes the theory put forward by the Chief Martial Law Administrator, Gen. Zia-ul-Haq, that Mr. Bhutto had a master plan for rigging of the elections. He says this is very different to Gen. Zia-ul-Haq's earlier stand in the Press statement earlier referred to.

Mr. Bhutto also denies that his acceptance of the proposal for a fresh election in any sense implied his own admission of "rigging". He says that in a democratic parliamentary form of government, a Prime Minister may at any time seek re-endorsement of his mandate from the people. That is all that he had agreed to do.

Mr. Bhutto describes as a "dangerous thought" the suggestion that the continuance of widespread protest demonstrations in the country can justify the Army overturning constitutional authority.

He said that if such a doctrine is accepted it would pave the way for any adventurer to destroy the civil authority of constitutional government.

Mr. Bhutto next proceeds to make a startling counter-allegation regarding the military takeover.

He says that the conspiracy giving rise to the agitation of April 1977 was both deep and deadly. The full story had yet to be told. The respondent's hand in it must be revealed. The massive foreign intervention had hardly yet come to the surface. The Islamic Conference held in Libya in June 1977 roundly condemned this foreign intervention. The Foreign Minister of Pakistan's hotel room in Paris was ransacked in May 1977 by foreign agents. The people of Pakistan have seen only the tip of the iceberg.

In August 1976 in this very city of Lahore Mr. Bhutto said "I was told in the Government House that we will make a horrible example if you do not cancel or postpone your nuclear reprocessing plant agreement with France. It is that, that has brought me again to this very city of Lahore but in Kot Lakhpat Jail in place of Government House."

Mr. Bhutto dismisses a possible claim by Gen. Zia that he had maintained the agreement with France. "He may yet have maintained it" Mr. Bhutto says "despite what has appeared in the various newspapers, but it is one thing to maintain an agreement without implementing it, and quite a different thing not to enter into it. It took me three strenuous years to conclude it. Let us therefore look beyond our nose and make an honest search for the reason behind the agitation that struck Pakistan in the spring of 1977."

With reference to the breakdown of negotiations between the Government and the PNA, Mr. Bhutto maintained that it was an established and acknowledged position that the efforts of the Ruling Party had been crowned with success by entering into the negotiations with PNA and by arriving at a settlement on 3-7-1977.

In view of the respondent's maneuver and the foreign intrigues it goes to the abiding credit of Mr. Bhutto's Government to have mastered the grave crisis by virtue of an agreement with the Opposition for fresh elections in October, 1977. This is the cardinal issue and not the Minutes of the Law and Order Committee, mentioned by the respondent.

With reference to the Minutes of the Law and Order Committee referred to in the Government's written statement, Mr. Bhutto says that it is highly unfair to give a distorted and one sided picture by quotations taken out of context. The Minutes of the Committee only briefly indicate the subjects discussed and the recommendations made. They are mainly on the reports made to the Committee by the Bureau of Inter-services intelligence, professional, governmental and other agencies and authorities.

If for instance the intelligence report had mentioned any conflict or dissension either in the Pakistan People's Party or in some parts of the country which affected the law and order situation, it had to be considered by the Committee. But that did not make the Committee a guardian of the interests of the Pakistan People's Party.

With reference to the allegation that there had been huge purchases of arms and large scale distribution of these among the members of the Pakistan People's Party with a view to preparing them for civil war, Mr. Bhutto gives an elaborate answer in paragraph 17 of his rejoinder.

He says that the arms licenses were issued for protection and not to terrorize the public that he acted in accordance with the practice which had existed from earlier times for the issue of arms licenses to the members of the public on the recommendations of public representatives.

There had been no deviation from this in his time, Mr. Bhutto said. He says that he had given written orders that recommendations of the public representatives should be attested and confirmed by the local police officials before the issue of licenses.

Mr. Bhutto goes on to say that the propaganda on the indiscriminate distribution of arms licenses to the Pakistan People's Party workers is an *ex-post facto* explanation to uphold the charge that preparations were being made by the Government to start a civil war. It is as preposterous as it is false, he asserted.

Then he gives details of his policy in this matter. He goes on to say that the Law and Order Committee considered that the Government instructions about issuing arms licenses on the recommendations of Members of the National Assembly and Members of the Provincial Assemblies were not to terrorize the public but were for the protection of the victims of atrocities perpetrated during the agitation.

Later that policy was considered likely to lead to further deterioration of the law and order situation because the Opposition had already amassed a large

number of arms and ammunition. Thereupon, the Committee recommended discontinuance of the issue of such licenses.

An important point is made by Mr. Bhutto regarding the use of secret funds. He emphatically asserts that secret funds were utilized by him for the promotion of the country's interests. Mr. Bhutto asserts that secret funds were never misused as was contended by the respondent.

This is a very sensitive and delicate issue, Mr. Bhutto said. According to the well established rules of the Government only a general certificate had to be furnished to the Finance Ministry certifying the total amount of secret funds spent in the financial year. Details of the expenditure on each item spent in the financial year are not required. This rule which has existed for a long time is based on the national interest, Mr. Bhutto claimed.

To open up the details would mean opening more than a Pandora's Box. "If the respondent wants to show the dangerous implications of the secrecy attached to this matter. I would have no objection", Mr. Bhutto says. However, in any event the injurious consequences that will follow and the irreparable damage to Pakistan's internal and external interest will fall squarely on the shoulders of the respondent.

Even if he foolishly assumes such responsibility, the damage to the vital interests of the State both internally and externally would have taken place.

Mr. Bhutto goes on to say that statecraft is not a child's play; it is not the game for untutored and enthusiastic adventurers who seek to burn the national interests in an attempt to secure personal power.

There are many secrets which might be only within the knowledge of the Head of the Government or one of the other high ranking Ministers or other officials who are party to it. Such secrets are never revealed. They go to the grave with the person who knows them.

This is the price that he had to pay for holding the highest office in the country. This is the sacrifice which has to be made in the supreme interests of the State and its citizens. Let us not, therefore, embark upon a dangerous gamble. These are not ordinary matters which can be discussed in the open *bazaar.*

If such inflammable issues are taken to the *bazaar,* not only will the *bazaar* burn, but the edifice of the State will crumble.

It would also end every particle of confidence of the various internal or external agencies which deal with the State on a confidential basis. Nobody will

trust such a Government, nobody would like zither to risk his life, or to work for the cause of this country.

"Despite the manner in which I am being continuously maltreated, harassed by the respondent", Mr. Bhutto says, "I am too much of a patriot even to dream of playing with State secrets. The respondent knows that some matters are within my knowledge, the revelation of which can literally strike at the roots of this country." It is, therefore, more prudent to trust the judgment of those who hold the highest elected office in the country and not seek to denigrate derobe them by making false and sensational allegations against them. In such a process it is the country that would be derobed.

After mentioning the difficulties he had to contend with when he became President in 1971, Mr. Bhutto goes on to say that the society is composed of all kinds of elements. Some of the individuals who have been posing as militant opposition stalwarts have been on the government payroll even before he became President.

There are so many threads in the tapestry of the social order. Individuals of all categories have to be satisfied to attain certain national objectives. In this connection secret service funds have to be deployed in such a manner that the right hand does not know what the left hand has done.

"I have no personal stake in the utilization of these funds. If I did not utilize these funds for the interests of the State I would not have returned to the Government large amount of foreign exchange which was needed for the state, missions but which was not utilized due to certain constraints.

"Only I was in a position to determine whether constraints existed or not. If I had been dishonest, I could easily have noted that the mission was completed. Nobody else was in a position to know and nobody else was in a position to question it. Nevertheless, large sum of foreign exchange which I held in cash for over a week was duly returned to our government." Mr. Bhutto claimed.

Funds were given to the office bearers of the Pakistan People's Party not because they were the office bearers of the Party but because they held more responsible official positions. They needed secret service funds for utilization for public purposes. Some persons not belonging to the Pakistan People's Party who held high official positions were also given huge amounts out of secret funds for public purposes. Those who did not hold official positions were also given limited funds for the same purposes.

For instance, the Governor of a province was not a member of Pakistan People's Party and yet he was given secret service funds also. He was a man of

means. He needed those funds entirely for public purposes.

A Governor of another province was given secret service funds for public purposes in the interests of provincial administration not given to other Governors. When these funds were given to the Governor in question he was not a member of the Pakistan People's Party. He joined the party after 5th July, 1977 after he ceased to be a holder of that office.

Mr. Bhutto then denies the allegation regarding the People's Foundation Trust. He says this is a *bona fide* charitable trust. The Central Board of Revenue has registered it as a charitable trust. He categorically and emphatically denied the allegation that this Trust has been used for the benefit of the members of his family. He says that the Bhutto family has made no monetary gain from it.

ARGUMENTS

After all these documents were filed the Supreme Court heard elaborate arguments regarding the validity and legal effects of the imposition of Martial Law by the Chief of the Army Staff. Mr. Zulfikar Ali Bhutto and Mr. Abdul Hafiz Pirzada also appeared personally before the Court and made submissions in respect of their positions. A third detenu, namely, Mr. Mumtaz Ali Bhutto also filed a written statement. Addressing the Court on behalf of the detenus, Mr. Yahya Bakhtiar complained that on the evening of 17th September, 1977, the Chief of the Army Staff made a public statement in which he leveled highly unfair and incorrect allegations against the Pakistan People's Party Government and the detenus by way of explaining away the arrests and detentions. Gen. Zia also indicated his intention of placing the detenus before a Military Court or Tribunal for trial in order to enforce "the principle of public accountability." The petitioners averred that this action had been taken against them in a *mala fide* manner with the ulterior purpose of preventing the Pakistan People's Party from effectively participating in the forthcoming elections which were scheduled to be held during the month of October, 1977. Relying mainly on the judgment of the Supreme Court in *Miss Asma Jilani* v. *the Government of Punja.*[24] Mr. Yahya Bakhtiar, counsel for the petitioners, contended that the Chief of Staff of the Pakistan Army had no authority under the 1973 Constitution to impose Martial Law on the country, that his intervention amounts to an act of treason in terms of Article 6 of the Constitution and by consequence, the Proclamation Order, 1977 and the Laws (Continuance in Force) Order of 1977 as well as the Martial Law Order No. 12 of 1977 under which the detenus have been arrested and detained are all without lawful authority and that even if all or any of these acts or actions can be justified on the doctrine of necessity, yet the arrest and detention of the

[24] PLD 1972 S.S. 139

leadership of the Pakistan People's Party was highly discriminatory and *mala fide* and intended solely for the purpose of keeping the Pakistan People's Party out of the forthcoming elections and the respondent cannot place himself beyond the reach of the Courts by relying upon an order promulgated by himself, as the 1977 Constitution continues to be the supreme legal instrument of the country especially as the respondent himself has declared that the Constitution was not being held in abeyance for the time being so as to create a peaceful atmosphere for the holding of the elections and restoration of democratic institutions. Mr. Yahya Bakhtiar submitted that, in the circumstances, the orders of detention have resulted in a flagrant violation of the detenus' fundamental rights as contained in chapter 1 part 2 of the Constitution particularly Articles 9, 10, 17 and 25 thereof which relate to the security of the person and safeguards also as to arrest and detention, freedom of association and the equality of every citizen before the law.

Mr. A. K. Brohi, counsel for the Federation of Pakistan took two preliminary objections against the maintainability of the petition which were overruled by the Court.

Mr. Brohi further maintained that the Court had no jurisdiction to grant any relief to the petitioner owing to the prohibition contained in Articles *4* and 5 of the Laws (Continuance in Force) Order, 1977 which clearly contemplate that no Court including the High Courts and the Supreme Court can question the validity of any Martial Law Order or Regulation or any order made there under by Martial Law Authorities. By this reason as well, the petition is not maintainable.

As to the legal character of the new regime and validity of the Laws (Continuance in Force) Order of 1977, the various Martial Law Regulations and Orders issued by the Chief Martial Law Administrator and the President of Pakistan under its authority, Mr. Brohi submitted that up to the fifth of July 1977, Pakistan was being governed under the 1973 Constitution but on that day a new legal order came into force by virtue of the proclamation issued by the Chief Martial Law Administrator, and this legal order has replaced temporarily the old legal order.

The validity or legality of any action which took place after the fifth of July 1977 can only be tested against the guidelines provided by the new legal order, Mr. Brohi said. According to him, the *Grundnorm* of the old legal order as provided by the 1973 Constitution has yielded to the new *Grurndnorm* provided by the Proclamation and the Laws (Continuance in Force Order) and to that extent, the jurisdiction of the superior Courts has been altered.

Mr. Brohi submitted that as the transition from the old legal order to the new legal order was not being brought about by any means recognised or

contemplated by the 1977 Constitution, it therefore, constitutes a meta-legal or extra-constitutional fact attracting the doctrine of revolutionary legality. By this concept, according to Mr. Brohi whenever a constitution and a national legal order under it are disrupted by an abrupt political change not within the contemplation of the Constitution, such a change is called a revolution which term also includes *a coup d'etat.*

In such a situation, the Supreme Court had to determine certain facts, Mr. Brohi said, which may be termed constitutional facts, relating to the existence of the legal order within the framework of which the Court itself exists and functions.

If it finds that all the institutions of State power have, as a matter of fact, accepted the existence of the new order which has just become effective, then, all questions of legality are to be determined within the framework of the new legal order.

Mr. Brohi argued that on this view of the matter, a viable alternative can be found between the two extreme positions adopted by the Pakistan Supreme Court in those two cases, i.e., *Doss's* case[25] and *Asma Jilani's* case;[26] one, holding that every revolution when successful would be legal; and other holding that a revolution as such is illegal.

According to Mr. Brohi, the Supreme Court in those two cases could have decided the controversy by simply holding that as a matter of constitutional fact, a new legal order had come into being in the country and the question and issue in that case could only be decided by reference to that new legal order which had attained effectiveness. He contended that the view taken by the Supreme Court in *Asma Jilani's* case[3] leaves several questions unanswered by rejecting Kelsen's Pure Theory of Law because it does not provide any guidelines as to what principles the Law Courts ought to apply in a case where a revolution has become effective by suppressing or destroying the old legal order.

As a result, Mr. Brohi submits that this Court should, therefore, lean in favour of holding that a new legal order has effectively emerged in Pakistan by means of a meta-legal or extra-constitutional change and for the time being, this is the legal order according to which all questions coming before the Court must be decided. In this view, it is not necessary for the Court nor is it concomitant of judicial power either to side with the revolution or to act as a counter-revolutionary by giving its seal of approval to a military intervention or by condemning it by describing it as illegal. Judicial restraint requires that the Court

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[25] PLD 12 T.S.C. 533.

[26] *Supra* Note 1.

should only take judicial notice of the events which have transpired in the country and decide as a constitutional fact whether the new legal order has become effective or not.

As to the necessity for the imposition of Martial Law on the fifth of July 1977, Mr. Brohi argued that the events leading thereto fall into two phases; one, the first phase related to the unconstitutional and illegal governance of Pakistan by the detenus and their associates and which terminated upon the event of the imposition of Martial Law, and two, the second phase, relates to the preparations which were being made by the detenus and their associates for the fomenting of civil war within the country and their intentions to frustrate and prevent the holding of free and fair elections and thereby consolidating their illegal tenure of office.

Mr. Brohi urged the Court to take judicial note of the picture emerging from the mosaic of these events which he cited merely to illustrate the overall pattern of developments not to embark upon a detailed factual inquiry which would be outside the scope of these proceedings.

According to Mr. Brohi, the specific illegalities committed in or at the instance of the then Government may be enquired into later when there will be a reasonable opportunity to the persons concerned for their defence in accordance with the law.

Mr. Brohi went on to state that massive rigging took place during the elections held on 7th of March 1977 in pursuance of the directives issued at the highest governmental level.

Mr. Brohi said that the then Chief Election Commissioner pointedly commented on the widespread irregularities committed in relation to the elections and pronounced his opinion that results in more than 50% of the seats were affected thereby. He further expressed the view that the proper course would be to hold fresh elections.

Secondly, Mr. Brohi contended that the evidence now available leads to the inescapable conclusion that there was a master plan for the rigging of elections which had been conceived, directed and implemented by the then Prime Minister, Mr. Z.A. Bhutto.

Mr. Brohi contended that as a result of this massive rigging of the elections, in violation of the mandate of the Constitution, of holding free and fair elections, Mr. Bhutto's Government lost constitutional authority and there were widespread disturbances throughout the country amounting to a repudiation of Mr. Bhutto's authority to rule the country.

Mr. Bhutto prolonged the dialogue between himself and the leaders of the Pakistan National Alliance in a *mala fide* manner so that the nation would reach a critical juncture and the spectre of civil war loomed ahead. It became clear beyond doubt that no possibility of a tree and fair election being held existed as long as the levers of power remained in Mr. Bhutto's hands.

Mr. Brohi asserted that there was a general recognition of this fact which also leads to widespread public demand that the Army should accept responsibility for the holding of elections.

According to Mr. Brohi, circumstances had made it imperative for the Army to step in and the imposition of Martial Law on 5th July, 1977 was greeted by a sigh of relief throughout the country.

Mr. Brohi stated that in the three months since the imposition of Martial Law, peace and quiet has been restored, the national economy which had reached the stage of collapse was slowly being brought back to normal, governmental institutions which were on the verge of disintegration are being restored to health and the country's foreign policy is being conducted in the national interest and not for the aggrandizement of Mr. Bhutto or the projection of his personal image.

Mr. Brohi contended that the Chief Martial Law Administrator had already declared his intention to hold elections as soon as possible and the present postponement of the October elections has been ordered in response to the public demand for enforcing accountability in relation to the leadership of the Pakistan People's Party.

In the view of Mr. Brohi, it could, thus, be seen that the Martial Law was imposed not in order to replace constitutional authority but in order to provide a bridge to enable the country to return to the path of constitutional rule.

Mr. Sarfuddin Pirzada, the Attorney General appearing as the Law Officer of the Court supported Mr. Brohi's submission that the change which took place in Pakistan on 5th July, 1977 did not amount to usurpation but merely happened to replace the usurpur who had illegally assumed power as a result of massive rigging of the elections on the 7th of March, 1977.

It was also intended to displace the illegally constituted assemblies both at the centre and in the provinces as the majority of the members had succeeded in the elections by corrupt and criminal practices.

Mr. Pirzada accordingly contended that the present situation was not

governed by the dicta of the Pakistan Supreme Court either in *Dosso's* case[27] or in *Asma Jilani's* case[28] because the circumstances here are radically different. There the change brought by the military intervention was of a permanent nature whereas the purpose of the present Chief Martial Law Administrator is to remain in power for a limited and temporary period so as to hold free and fair elections for the restoration of democratic institutions.

Mr. Pirzada submitted that effectualness alone, to the exclusion of all considerations of morality and justice, cannot be a condition of the validity of the legal order.

Mr. Pirzada submitted, however, that the circumstances, culminating in the imposition of Martial Law on 5th July, 1977 fully attracted the doctrine of necessity and of *Salus Populi Suprema Lex.* As a result the action taken by the Chief Martial Law Administrator must be regarded as valid and the Laws (Continuance in Force) Order, 1977 must be treated as being a super constitutional instrument now regulating the governance of the country.

The Attorney General contended that the doctrine of necessity is not only a part of the legal system of several European countries including Britain, but is also recognised by the Holy *Quran.*

The Attorney General contended that, consequently, all actions taken by the Chief Martial Law Administrator to meet the exigencies of the situation and to prepare the country for future elections with a view to restoration of democratic institutions must be accepted by the Court as valid. There can be no question of imposing condition which concept can only apply in the case of acts of a usurper.

On this view of the matter, the Attorney General, Mr. Sarufuddin Pirzada submitted that the Court could not grant any relief to the detenus under Article 184(3) of the Constitution as the fundamental rights stood suspended by virtue of Clause III of Article 2 of the Laws (Continuance in Force) Order 1977.

As earlier mentioned this case was heard by the Chief Justice Mr. Justice Anwar-ul-Haq and eight other Judges of the Supreme Court of Pakistan, namely Mr. Justice Wanduddin Ahmed, Mr. Justice Mohamed Akram, Mr. Justice Dorab Patel, Mr. Justice Safdar Shah, Mr. Justice Kaiser Khan and Mr. Justice Nasim Hasan Shah and Mr. Justice Mohamed Afzal Cheema.

As stated earlier the entire Court with the exception of Mr. Justice Kaiser Khan was of the view that, in the first place, the Court had jurisdiction in the matter; in

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[27] *Supra* Note 2.
[28] *Supra* Note 1.

the second place that the Constitution of 1973 still Remains the law of the land; and thirdly, that the Martial Law regime of Gen. Zia-ul-Haq was acceptable merely as a temporary expedient to bring the country back on to the rails of democracy and it was only to that extent accepted as lawful.

The Chief Justice and the seven Judges supporting him, as against Mr. Justice Kaiser Khan, denied *a carte blanche* to the military regime as sought by Mr. Brohi. It was only a qualified approval that they gave to this regime.

A summary of the judgment of the Chief Justice and other Judges now follows.

After summarizing the contentions of the parties and the arguments of counsel, the Chief Justice observes that the main question that arises for determination in this case is the legal character of the new regime which has come into existence in Pakistan as a result of the proclamation of Martial Law on the fifth of July 1977.

In the comparatively short period of thirty years since attaining independence, the C. J. continues, Pakistan has passed through six periods of Martial Law. First, the Martial Law imposed under the orders of the Federal Govt. in 1953 in Lahore in order to suppress the anti-Ahmedia agitations and the disturbances arising there from; second, in 1958 the Martial Law imposed by President Sikander Mirza and Field Marshal Ayub Khan; third, the 1969 Martial Law imposed by Aga Mohamed Yahya Khan to depose Field Marshal Ayub Khan; fourth, the continuation of 1968 Martial Law by Mr. Zulfikar Ali Bhutto on assuming power on 20th December 1971 and becoming the first civilian Chief Martial Law Administrator in our history; fifth, the local Martial Law in April 1977 in several cities of Pakistan imposed by Mr. Bhutto's Federal Govt. under Article 245 of the 1973 Constitution and sixth, the Martial Law imposed on 5th July, 1977 by the Chief of the Army Staff, General Zia-ul-Haq.

The Chief Justice observes that the question of the legality and the extent of powers enjoyed by these various regimes have been repeatedly examined by the Courts of Pakistan. He referred to *Mohamed Umar Khan* v. *Crown,*[29] *Dosso* v. *the State,*[30] *Mohamed Ayub Khoro* v. *Pakistan,*[31] *Gulab Din* v. *Major A.T. Shoukat,*[32] *Mir Hasan* v. *State,*[33] and *Asma Jilani's-case.*[34]

29 PLD 1954 Lahore 528
30 PLAD 1968 SC 533
31 PLAD 1964 SC Pali 237
32 PLAD 1961 Lahore 952
33 PLD 1969 Lahore 786
34 Supra Note 1.

The Chief Justice then goes on to consider the concept of revolutionary legality relied upon by Mr. Brohi and as expounded by Prof. Hans Kelsen. This concept was accepted by the Supreme Court of Pakistan in those two cases as already referred to but rejected in the case of *Asma Mani.*

The Chief Justice then examines those two cases in the light of the submissions now made by Mr. Brohi in this behalf. He points out that the so-called theory of legality makes effectiveness *simpliciter* the supreme test. He cites from the judgment of Chief Justice Mohammed Munir in those two cases where Chief Justice Mohammed Munir has said that "a revolution is generally associated with public tumult, mutiny, violence and bloodshed but from the juristic point of view the method by which and the persons by whom a revolution is brought about is wholly immaterial. The change may be attained by violence or it may be perfectly peaceful, it may take a form of *coup d'etat* by a political adventurer or may be effected by persons already in public positions." Equally irrelevant in law is the motive of a revolution according to Munir C. J. in as much as "the destruction of the constitutional structure may be prompted by a highly patriotic impulse or by the most sordid of ends. For the purpose of the doctrine here explained a change is in law a revolution if it annuls the constitution and the annulment is effective. If the attempt to break the Constitution fails those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason but if the revolution is victorious, in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle, the validity of the law thereafter made is judged by reference to the new and not the annulled Constitution. Thus, the essential condition to determine whether the Constitution has been annulled is the efficacy of the change."

Chief Justice Anwar-ul-Haq observes that the view taken by the Supreme Court in those two cases continued to hold the field for almost 14 years until it was challenged in *Asma Jilani's* case in connection with an order for detention made under the Martial Law issued by General Aga Mohamad Yahya Khan and inherited by Mr. Zulfikar Ali Bhutto on his assumption of power as Chief Law Administrator on 20th December, 1971. The learned Judges hearing *Asma Jilani's* case unanimously came to the conclusion that these two earlier cases had not been correctly decided. They accordingly proceeded to overrule them.

Chief Justice Hamoodur Rehman observed that in laying down a novel justice principle of such far-reaching importance, Chief Justice Munir in the case of *State v. Dosso* proceeded on the basis of certain assumptions, namely:

1. that the basic doctrine which the whole science of modern jurisprudence rested upon was found in Kelsen's Pure Theory of Law;
2. that any abrupt political change not within the contemplation of the Constitution constitutes a revolution no matter how temporary or transitory is the change if no one has taken any steps to oppose it; and
3. that the rule of international law with regard to the recognition of States can determine the validity also of a State's internal sovereignty.

These assumptions were not justified. Kelsen's theory was by no means a universally accepted one nor was it a theory which had become a basic element of the science of modern jurisprudence. After further discussion, Chief Justice Hamoodur Rehman accepted the criticism, that Chief Justice Munir in the earlier case not only misapplied the doctrine of Hans Kelsen, but also fell into error in thinking that it was a generally accepted doctrine of modern jurisprudence. Even the disciple of Kelsen had hesitated to go so far as Kelson had gone and in any event, if a *Grundnorm* is necessary, Pakistan need not go to the western legal theories to discover it. Pakistan's own *Grundnorm* is enshrined in its own doctrine that the legal sovereignty over the entire universe belongs to Almighty Allah alone and the authority exercisable by the people within the limits prescribed by Him is a sacred trust. This is an immutable and unalterable *Grundnorm* which was clearly accepted in the Objectives Resolution passed by the Constituent Assembly of Pakistan on 7th March, 1949. This has not been abrogated by anyone so far nor has this been departed from or deviated from by any regime—military or civil. Indeed, it cannot be for it is one of the fundamental principles enshrined in the Holy *Quran.* It is under this system that the Govt. becomes a government of laws and not of men for no one is above the law. The principle enunciated in those two cases, therefore, is wholly unsustainable and it cannot be treated as good law either on the principle of State necessity or even otherwise.

Chief Justice Anwar-Ul-Haq observes that Mr. Brohi has indeed placed an uphill task in questioning the correctness of this judgment, in so far as it rejects the application of Kelsen's Pure Theory of law for providing validity to the new legal order emerging from a *coup d'etat.*

The Chief Justice continues that "unless compelling reasons are shown for departing from the view taken by this Court in *Astna Jilani's* case, I would like to adhere to the *ratio* of that case for the reasons so ably stated in the judgment of Hamoodur Rehman Chief Justice and Justice Mohamed Yaqub Ali as he then was."

The Chief Justice proceeds to discuss the legality of the 1973 Constitution of

Pakistan and he concludes by stating that the controversy in the present case must proceed on the assumption that the 1973 Constitution had been validly framed and it was in force when the Chief of the Army Staff proclaimed Martial Law on fifth of July 1977.

The Chief Justice then proceeds to discuss the Southern Rhodesian case which went ultimately to the Privy Council.[35] Lord Reid delivered the majority judgment of the Privy Council and Lord Pearce delivered a dissenting opinion. The Chief Justice concludes his discussion by observing that the *Grundnorm* is an enduring phenomenon and it is insufficiently appreciated that not only effectiveness, but also conformance with morality and justice are the very springs of its being and existence.

The Chief Justice cites with approval the opinions of various writers including Gardiner, G.C. Field, Prof. Harold Laski and Dean Roscoe Pound that *a de facto* sovereign cannot become *dejure* merely by exacting obedience by force or coercion. On the other hand, they had accepted the doctrine that a *de facto* sovereignty becomes *dejure* by consent and by the development of the habit of obedience and that *a de facto* sovereign gets, thus, his position confirmed by an election or ratification by the people by habitual obedience over a sufficiently long period of time and then alone can he claim to have acquired *de lure* sovereignty as well.

Then, the Chief Justice refers to other learned writers including Dias and de Smith.

Concluding his discussion of constitutional theory, the Chief Justice says, that the legal consequences of an abrupt change of the kind which we are dealing with in this case must be judged not by the application of abstract theory of law in vacuum but by consideration of the total *milieu* in which the change is brought about, namely, the objective political situation prevailing at the time, its historical imperatives and compulsions, the motivations of those responsible for the change and the extent to which the old legal order is sought to be preserved or suppressed.

Only on a comprehensive view of all these factors, can a proper conclusion be reached as to the true character of the new legal order.

The Chief Justice further says that the theory of revolutionary legality supported by Mr. A.K. Brohi can have no application or relevance to a situation where the breach of the legal continuity is said to be or declared to be purely temporary and for a specific limited purpose.

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[35] Reported in III All E.R. 561.

Such a phenomenon can more appropriately be described as one of constitutional deviation rather than of revolution.

The Chief Justice concludes that no justification had been made out to prefer the earlier cases in supersession of the view adopted by the Supreme Court in *Asma Jilani's* case regarding the application of Kelsen's theory of revolutionary legality to the circumstances prevailing in Pakistan.

A stage had now been reached, the Chief Justice says for a more detailed examination of the circumstances culminating in the imposition of Martial Law in Pakistan on the fifth of July 1977. Many of the averments made in the written statement filed by Mr. A.K. Brohi on behalf of the Federation of Pakistan have been strenuously controverted by the detenus who have filed written rejoinders and also appeared in person before the Court. Mr. A.K. Brohi has filed a rejoinder in reply to those statements of the detenus. Mr. Zulfikar Ali Bhutto has filed a further written statement in response to the affidavit and retired Gen. Tikka Khan, former Chief of the Staff of Pakistan's Army has also filed an affidavit which has been placed on the record in refutation of certain actions attributed to him in the respondent's written statement.

While taking note of all these statements and counter-allegations made by the parties against each other this Court is primarily concerned with ascertaining the broad trends and circumstances which culminated in the overthrow of the Government of Mr. Z. A. Bhutto.

For this purpose, we must take judicial notice of the various events which happened in the country during the period commencing from 7th March, 1977 on which date the general elections for the National Assembly of Pakistan were held resulting in an overwhelming majority for the Pakistan People's party led by Mr. Z. A. Bhutto. Ample material appears to be available on the record of this Court to enable us to arrive at the necessary conclusions.

The National Assembly consisting of members elected from four provinces of Pakistan in 1971 was dissolved in January this year by the President of Pakistan acting on the advice of the then Prime Minister, Mr. Z. A. Bhutto. Similar action was taken by the Governor of four provinces in respect of the Provincial Assemblies in Punjab, Sindh, N.W.F.P. and Baluchistan. Fresh elections were ordered to he held for all these legislative bodies within 90 days from the date of dissolution as required by Clause 11 of Article 224 of the 1973 Constitution. An intensive political campaign was launched by the Pakistan People's Party and the Pakistan National Alliance, a combination of nine opposition parties headed by Maulana Mufti Mahmood.

Most of the political observers including the top leaders of Pakistan expressed the view that the elections were going to be hotly contested between the two major parties, although Mr. Z.A. Bhutto and other leaders of his party expressed confidence that they would win a majority at the Centre and in all the four provinces.

When, the results of the polling to the National Assembly seats were announced on 7th March 1977, the People's Party had obtained 155 seats out of the total of 200 seats of the National Assembly including a large number of those seats, particularly in Punjab, where its success was, to say the least, very doubtful.

The Pakistan National Alliance refused to accept these results and alleged massive rigging of the elections by government officials under the directions of Mr. Z. A. Bhutto. They also decided to boycott the polling to the provincial assemblies which was to be held three days later.

The Pakistan National Alliance called for a countrywide protest against the rigging of the elections. The agitation gained momentum sweeping all parts of the country.

The main demands of the opposition were resignation of the Prime Minister, resignation of the then Chief Election Commissioner, fresh elections to the National and Provincial Assemblies.

As the demands were not conceded, the agitation continued and soon assumed a violent form resulting in widespread disturbances which continued to grow in magnitude.

It soon became apparent that the disturbances were beyond the control of the civil armed forces with the result that the Army had to be called out in many places.

On 21st April, 1977, the Federal Government of Mr. Z. A. Bhutto issued a direction under Article 245 of the Constitution calling upon the Armed Forces to come in aid of the civil power in Karachi, Lahore and Hyderabad towns. Troops were also called out in aid of the civil power by the local executive authorities in many other towns under the provisions of the Code of Criminal Procedure.

The agitation, however, continued unabated resulting in extensive damage to public and private property, heavy loss of life. Protest marches continued in defiance of orders made by the local Martial Law Administrators and many instances of ridiculing Army personnel were reported from various towns.

The top leadership of the Pakistan National Alliance and large numbers of

their followers were arrested throughout the country and their trial by Military Courts was also authorised.

As these repressive measures did not appear to produce the desired results, Mr. Z. A. Bhutto announced in May, 1977 that as he could not sacrifice the National Assembly on the demand of the

Opposition, he would offer himself for a Referendum on the question whether he should continue as Prime Minister of the country or not. And for this purpose, the Seventh Amendment to the Constitution was passed by the National Assembly on 12th May, 1977. However, the Opposition rejected this proposal and the agitation continued.

In these circumstances, Mr. Bhutto agreed in principle to hold fresh elections to the National Assembly and offered for that purpose to enter into a dialogue with the leaders of the Pakistan National Alliance.

The talks commenced on 3rd June, 1977 on which date a joint appeal was made by Mr. Z.A. Bhutto and the leaders of the Opposition for calling off the strike during the continuance of the talks. As a result of this joint appeal, the protest movement was temporarily halted. The direction issued by the federal government under Article 245 of the Constitution was also withdrawn and the troops were gradually pulled out from riot-torn areas.

The talks continued until about 25th or 26th of June, 1977 when it was announced that accord had been reached between the parties and that the same would now be reduced into writing. The Prime Minister then left for a short tour to some friendly countries. During his absence, the task of drafting the accord could not make progress. Fresh efforts were made to break the deadlock and a night long session between two negotiating teams was held on the second of July, 1977. It was then announced, that full accord has been reached and a formula accordingly will soon be signed by both parties after it has been formally ratified by the General Council of the Pakistan National Alliance.

Unfortunately, differences again arose. In the Press Conference convened by the Prime Minister late on the fourth of July, 1977, it was announced that fresh talks would be held between Mr. Abdul Hafiz Pirzada of Pakistan People's Party and Prof. Gafoor Ahmed of Pakistan National Alliance to iron out these differences. The Prime Minister, however, announced that his party would also raise 10 or 12 other issues as was being done by the Pakistan National Alliance.

It appears that the takeover by the military authorities was carried out in the early hours of 5th July, 1977 soon after this announcement by the Prime Minister.

The allegation that there was massive rigging of the elections under the directions of Mr. Z. A. Bhutto has been strenuously denied by Mr. Bhutto himself and by Mr. Hafiz Pirzada on behalf of the Pakistan People's Party. However, the important point for our present purposes is not whether in fact there was massive rigging of the elections or not but that the people all over Pakistan protested that there was massive rigging by the government officials and other functionaries.

In addition, we have seen that there is material in the form of certain actions taken in this behalf by the government and the Chief Election Commissioner. The Chief Justice then proceeds to examine some acts and decisions of the Chief Election Commissioner. In particular the Chief Justice considers four orders passed by the Election Commission in exercise of the summary powers, which, he says, "make very instructive reading".

The Chief Justice concludes that it was unnecessary to go into the details of the so-called rigging. The relevant fact in the present proceedings being that there were widespread allegations of massive rigging in the elections in favour of the candidates of the Pakistan People's Party and that these allegations find *prima facie* support from the orders and statements made by the Chief Commissioner and the Members of the Election Commission as mentioned above. These circumstances explain the genesis of the protest movement launched by the Opposition against Mr. Z.A. Bhutto and his Government.

Mr. Brohi had asked the Court to take judicial notice of the submissions made before the Supreme Court by Mr. Yahya Bakhtiar, Attorney General as he then was, while arguing in appeal on behalf of the Federal Government against the decision of the Lahore High Court declaring unconstitutional the imposition of local Martial Law by the Armed Forces of Pakistan in pursuance of the direction issued by the Federal Govt. under Article 245 of the Constitution. Mr. Yahya Bakhtiar gave certain facts and figures in justification of the action taken by the Federal Government, the details of which follow. These losses and casualties which according to Mr. Brohi were unprecedented appeared, the Chief Justice said, to lend support in submissions made by Mr. Sharifuddin Pirzada. The protest movement launched by the Opposition against the alleged massive rigging had assumed very serious proportions, indeed.

The Chief Justice then states his conclusion on this part of the case in the following words:

"On the basis of the material brought to the notice of the Court by M/s A. K. Brohi, Sharifuddin Pirzada consisting mostly of official reports and decisions as well as the contemporary reports in the official newspapers, I think the Court in entitled to take judicial notice of the following facts:

1. that from the evening of 7th March 1977, there were widespread allegations of massive official interference with the sanctity of the elections in favour of the candidates of the Pakistan People's Party;

2. that these allegations amounting almost to widespread belief among the people generated a nation-wide wave of resentment and gave birth to protest agitation which soon spread from Karachi to Khyber and assumed very serious proportions;

3. that the disturbances resulting from this movement went beyond the control of the civil armed forces;

4. that the disturbances resulted in heavy loss of life and property throughout the country;

5. that even the calling out of the troops under Article 245 of the Constitution by the Federal Govt. and the consequent imposition of local martial law in several important cities of Pakistan and the calling out of troops by the local authorities under the provisions of the Code of Criminal Procedure in smaller cities and towns did not have the desired effect and the agitation continued unabated;

6. that the allegations of rigging and official interference with elections in favour of candidates of the ruling party were found to be established by judicial decisions in at least four cases which displayed a general pattern of official interference;

7. that public statements made by the then Chic ƒ Election Commissioner confirmed the widespread allegations by the Opposition regarding official interference with the elections and endorsed the demand for fresh elections;

8. that in the circumstances, Mr. Zulfikar Ali Bhutto was compelled to offer himself for a referendum under the Seventh Amendment to the Constitution which, however, did not have any impact at all on the course of the agitation and the demand for his resignation and for fresh elections continued unabated with the result that the referendum plan had to be dropped;

9. that in spite of Mr. Bhutto's talks with the leadership of the Pakistan National Alliance and the temporary suspension of the movement against the Government, officers charged with maintaining law and order continued to be apprehensive that in the event of failure of the talks there would be a terrible explosion beyond the control of the civilian authorities;

10. that although the talks between Mr. Bhutto and the Pakistan National Alliance leadership had commenced on the third of June 1977 on the basis of his offer for holding fresh elections to the national and provincial assemblies, yet they had dragged on for various reasons and, as late as 4th of July 1977, the Pakistan National Alliance leadership was insisting that nine or ten points remained to be resolved and Mr. Bhutto was also stating that his side would similarly put forward another ten points if the General Council of the Pakistan National Alliance would not be satisfied with the accord as already reached on the morning of third of July 1977;

11. that during the crucial days of the deadlock between Mr. Zulfikar Ali Bhutto and the Pakistan National Alliance leadership, the Punjab Government sanctioned the distribution of firearms licenses on a vast scale to its party members and provocative statements were deliberately made by the Prime Minister's Special Assistant Mr. Ghulam Mustafa Khar who had patched up his differences with the Prime Minister and secured his appointment as late as 16th of June 1977;

12. that as a result of the agitation, all national economic activities in the country stood seriously disrupted with incalculable damage to the nation and the country."

The Chief Justice continues, that in the light of these facts, it became clear, that from the seventh of March 1977 onwards, Mr. Z. A. Bhutto's constitutional and moral authority to rule the country as Prime Minister stood seriously eroded. The Govt. was finding it more and more difficult to maintain law and order, to run the ordinary administration of the country, to keep the educational institutions open and to ensure normal economic activities. This constitutional authority not only of the Prime Minister but also of other federal ministers as well as of the Provincial Governors was being repudiated on a large scale throughout the country. The national representative character of the national and provincial assemblies was also not being accepted by the people at large. There was, thus, a serious political crisis in the country leading to a breakdown of constitutional machinery in so far as the executive and legislative organs of the State were concerned. A situation had, therefore, arisen for which the Constitution provided no solution, It was in these circumstances that the Armed Forces of Pakistan headed by the Chief of Staff of the Pakistan's Army, Gen. Zia-ul-Haq, intervened to save the country from further chaos and bloodshed, to safeguard its integrity and sovereignty and to separate the warring factions which had brought the country to the brink of disaster, It was undoubtedly an extra-constitutional step but obviously dictated by the highest considerations of State necessity and welfare of the people.

The Chief Justice, then, sets out a declaration made by Gen. Zia-ul-Haq on the evening of 5th June 1977 explaining the reasons for the action he had taken.

The Chief Justice proceeds to hold that the explanation given by Gen. Mohamed Zia-ul-Haq for the Army's intervention was a true reflection of the situation which had developed over the past four months as a result of the Pakistan National Alliance's agitation and repudiation of Mr. Bhutto's constitutional and moral authority as Prime Minister of Pakistan. The statement, according to the Chief Justice correctly brings out the necessity for the imposition of Martial Law.

The Chief Justice then proceeds that it is also clear that the sincere and unambiguous declaration of his objectives by the Chief Martial Law Administrator was a major factor in persuading the people of Pakistan willingly to accept the new dispensation as an interim arrangement to bridge the gap between the breakdown of the previous administration and the induction of the new elected government under the terms of the 1973 Constitution.

The Chief Justice states that the new arrangement therefore acquires its effectiveness owing to its moral content and promise of restoration of democratic institutions and he adds that the willingness of the Judges of the superior Courts to take the new oath after the declaration of Martial Law was also funded upon

the same considerations.

The Chief Justice then proceeds to state that having found that the extra-constitutional step taken by the Armed Forces of Pakistan was justified by the requirements of State necessity and welfare of the people it is now necessary to examine its legal consequences.

The Chief Justice then goes on to discuss the implication of the doctrine of necessity and he accepts the view of one of the judges of the Cyprus Supreme Court in a case arising in that country: "the following pre-requisites must be satisfied before the doctrine of necessity can become applicable:

(a) an imperative and inevitable necessity or exceptional circumstances;
(b) no other remedy to apply
(c) the measure taken must be proportionate to the necessity; and
(d) it must be of a temporary character limited to regulation of exceptional circumstances. It was added that a law, thus, enacted is subject to the control of the Courts to decide whether the aforesaid pre-requisites are satisfied, i.e., whether there exists such a necessity and whether the measures taken were appropriate to meet it.

The Chief Justice has then considered a case from Nigeria and he then reverted to the observations made by Homoodur Rehman, Chief Justice of Pakistan in *Asma Jilani's* case.

The Chief Justice then proceeds to say that a review of the law of necessity as recognised in various jurisdictions clearly confirms the statement made in this behalf by Chief Justice Mohamed Munir in the reference by the Governor General[36] to the effect that an act which would otherwise be illegal becomes legal if it is done *bona fide* under the stress of necessity—the necessity being referable to an intention to preserve the Constitution, the State for the Society and to prevent it from dissolution. The principle has been reiterated by the Supreme Court in *Astna Jilani's* case with a difference that where the Court is dealing with the acts of a usurper, such act may be condoned but not validated by the application of the law of necessity.

The Chief Justice holds that imposition of Martial Law in the case before the Court was impelled by high considerations of State necessity and welfare of the people. The extra-constitutional step taken by the Chief of the Army Staff to overthrow the Government of Mr. Zulfikar Ali Bhutto as well as all the provincial governments and to dissolve federal and provincial legislatures stands validated in accordance with the doctrine of necessity.

[36] PLD 55 at 435.

The Chief Justice next turns to consider the scope of the powers of the Chief Martial Law Administrator which he may exercise during the temporary period for which he has taken control of the administration. Here the Chief Justice deals with the contention by the Attorney General that once the takeover action is validated on the principle of necessity, then, the Chief Martial Law Administrator would have the right to govern the country in any manner he thinks best and the Courts of Pakistan will be bound by the provisions of the Laws (Continuance in Force) Order 1977 which must, henceforth, be treated as a super-constitutional instrument binding all authorities in Pakistan.

Referring to the *Corpus Juris Secundum*[37] and *Salmond on Jurisprudence*[38] the Chief Justice considers this contention and then goes on to refer to the various statements of the Chief Martial Law Administrator made on 5th of July 1977 and thereafter. The Chief Justice concludes: "in the presence of his unambiguous declarations, it would be highly unfair and uncharitable to attribute any other intention to the Chief Martial Law Administrator and to insinuate that he has not assumed power for the purposes stated by him or that he does not intend to restore democratic institutions in terms of 1973 Constitution. Such being the case, in my opinion, the remarks made by de Smith[39] to which reference has already been made, apply with full force to the situation prevailing at present in Pakistan, namely, that "In some situations where unconstitutional action has been taken by persons wielding effective political power it is open to a judge to steer a middle course. He may find it possible to say that the framework of the pre-existing order survives but that the deviation from the norms can be justified on the ground of necessity."

The Chief Justice then proceeds to hold that, the true legal position that, therefore, emerges is (I) that the 1973 Constitution still remains the supreme law of the land subject to the condition that certain parts thereof have been held in abeyance on account of State necessity; (II) that the President of Pakistan and the superior Courts continue to function under that Constitution. The mere fact that the Judges of superior Courts have taken a new oath after the declaration of Martial Law does not, in any manner, derogate from the position as the Courts have been originally established under the 1973 Constitution and have been continued in their functions in spite of the proclamation of Martial Law; (III) that the Chief Martial Law Administrator having validly assumed power by means of an extra constitutional step in the interests of the State and for the welfare of the people, is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as

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[37] Vol. 98.
[38] At 193.
[39] *Constitutional and Administrative Law.*

falling within the scope of the law of necessity, namely, (a) all acts or legislative measures which are in accordance with or could have been effected under the 1973 Constitution, including the power to amend it; (b) all acts which tend to advance or promote good of the people; (c) all acts required to be done for the ordinary orderly running of the State; and (d) all such measures as would establish or lead to the establishment of the declared objective of the proclamation of Martial Law, namely, restoration of law and order and normalcy in the country and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institutions under the 1973 Constitution; (IV) that these acts or any of them may be performed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations or Orders as the occasion may require and (V) that the superior Courts continue to have the power of judicial review to judge the validity of any act or action of the Martial Law Authorities, if challenged, in the light of the principles underlying the law of necessity as stated above. Therefore, their powers under Article 199 of the Constitution, thus, remain available to the full extent and may be exercised as heretofore notwithstanding anything to the contrary contained in any Martial Law Regulation or Order.

The superior Courts continue to remain judges of the validity of the actions of the new regime in the light of the doctrine of necessity because the new regime represents not a new legal order but only a phase of constitutional deviation dictated by necessity.

The Chief Justice concludes his judgment by a summary of the final position in the following words:

(i) that legal character and validity of any abrupt political change brought about in a manner not contemplated by the pre-existing Constitution or legal order cannot be judged by the sole criterion of the success or effectiveness as contemplated by Kelsen's Pure Theory of Law. Not only has this theory not been universally accepted or applied, but it is also open to serious criticism on the ground that by making effectiveness of the political change the sole condition or criterion of its legality, it excludes from consideration sociological factors of morality and justice which contribute to the acceptance or effectiveness of the new legal order. The legal consequences of such a change must, therefore, be determined by a consideration of the total *milieu* in which the change is brought about, including the motivation of those responsible for the change and the extent to which the old legal order is sought to be preserved or suppressed; (ii) that in any case the theory of revolutionary legality can have no application or relevance to a situation where the breach of legal continuity is of a purely temporary nature and for a specified limited purpose. Such a phenomenon can more appropriately be described as one constitutional deviation rather than a revalution; (iii) that examined in this light, the proclamation of Martial Law on 5th July, 1977 appears to be an extra-constitutional step necessitated by the complete breakdown and

erosion of constitutional and model authority of the Government of Mr. Z. A. Bhutto as a result of the unprecedented protest movement launched by the Pakistan National Alliance against the alleged massive rigging of the elections to the National Assembly held on the 7th March, 1977. It was a situation for which the Constitution provided no solution and the Armed Forces had, therefore, to safeguard its integrity and sovereignty and to separate the warring factions which had brought the country to the brink of disaster; (iv) that the imposition of Martial Law, therefore, stands validated on the doctrine of necessity and the Chief Martial Law Administrator is entitled to perform all such acts and promulgate all legislative measures which have been consistently recognised by judicial authorities as falling within the scope of the law of necessity; (v) that, as has also become clear from a review of the events resulting in the culmination of the Martial Law and the declaration of intent made by the Chief Martial Law Administrator, the 1973 Constitution still remains the supreme law subject to the condition that certain parts thereof have been held in abeyance on account of state necessity and the President of Pakistan as well as the superior Courts continue to function under this Constitution. The Constitution has not been completely suppressed or destroyed and this is merely a case of constitutional deviation for a temporary period and for a specific and limited objective, namely, the restoration of law and order and normalcy in the country, and the earliest possible holding of free and fair elections for the purpose of restoration of democratic institution under the 1973 Constitution; (vi) that, accordingly, the superior Courts continue to have the power of judicial. review judge the validity of any act or action of the Martial Law Authorities if challenged in the light of the principles underlying the law of necessity as set out in this judgment The powers under Article 199 of the Constitution, thus, remain available to their full extent and may be exercised as heretofore, notwithstanding anything to the contrary contained in any Martial Law Regulation or Orders; and (vii) that the provisions contained in Clause 3 of Article 2 of the Laws (Continuance in Force) Order, 1977 suspending the right to enforce fundamental rights are valid for the reason that the situation prevailing in the country was obviously of such a nature as to amount to an Emergency contemplated by Clause (i) of Artical 232 of the Constitution and the right to enforce fundamental rights could, therefore, be legitimately suspended by an order of the kind which could have been made under Clause 2 of Article 233 of the Constitution.

As a result, the present petition fails and is hereby dismissed. However, it will be open for the detenus if so advised to move the appropriate High Courts under Article 199 of the Constitution. The judges following the Chief Justice, Mr. Wahid-ud-din Ahmed, Jo, and Mr. Mohamed Akram Ji totally concurred with the Chief Justice. So did Mr. Justice Dorab Patel, Mr. Justice Mohd, Alum, Mr. Justice Safdar Shah, Mr. Justice Kaiser Khan, however, struck a different note. He said that he agreed with the Chief Justice, that the petition be dismissed, but he reached this conclusion on quite different grounds; he held that this court has no

jurisdiction in the matter. Kaiser Khan held that it cannot be said that his Court holds its present existence and derives its present authority from the old Constitution; it owes its existence and derives its present authority from the present *de facto* Government which is in full control of the government of the country. Knowing that the Court as such is not behind the revolution, it has nonetheless permitted it to continue and exercise its function as a Court and has authorised its public officials to enforce the court's judgments and orders.

Last we come to the judgment of Mr. Justice Mohamed Afzal Cheema which, concurring with the Chief Justice, contains interesting references to Islamic jurisprudence. Justice Cheema refers to the first Khalifa Abu Bakr, who upon taking office as Amir-ul-Mominin, stated:

"Obey me so long as I obey God and his Messenger and if I disobey, don't obey me." Submission to the authority of the Ruler and obedience to his command did not extend to illegal and immoral directives. The learned judge has also referred to the great Imam Abu Bann who used the technical expressions of Imam-bil-Haq and Imamb-bin-Fefil which are respectively synonymous with *de jure* and *de facto* Ruler. Taking a balanced view, Imam Abu Hanifa adopted a middle of the road course. On the one hand, Imam Abu Hanifa laid emphasis on the maximum tolerance of an unjust ruler in the widest interests of public order, prevention of chaos and bloodshed. Such considerations become irrelevant when the Ruler openly transgresses limits and becomes an unjust tyrant. He held that *Kharuj* or rebellion against an unjust ruler was not lawful so long as there was no interference with the orderly running of the Government; people were free to offer prayers, to perform pilgrimage and Courts of law were permitted to function properly. Imam Abu Hanifa supported the *Kharuj* of Zain-bin-Ali, grandson of Imam Hussain and brother of Imam Baqar in the first instance, and subsequently of Mohamad Bin Abdulla in 145 *Hijri* against the Abosid Khalifa Al-Mansur. This wise attitude of Imam Abu Hanifa was based on a rational harmonisation of two traditions of the Holy Prophet. In one of these, empasis was laid on the imperative of obedience to Imam Mutagallab, the *de facto* Ruler and it was observed that the people were under an obligation to obey him, however unprepossessing he was provided he held power with the *bona fide* intention of delivering the nation from the clutches of an unjust tyrant and himself observed the limits of Allah. On the other hand, the Muslims have been enjoined to rise in revolt against an unjust Ruler and if killed in action, have been described as martyrs. In the circumstances of the present case, Justice Cheema agreed with the Chief Justice that the doctrine of necessity was attracted and he agreed with the Chief Justice's exposition of the constitutional position in regard to the scope of the validity of the acts of the new regime and the conditions and limitations imposed thereon.

More Accusations

A lie has no legs, but a
scandal has wings.

Thomas Fuller

Mr. Bhutto was at the height of his popularity with the masses when the four major power blocs of Islamabad namely, the Military, the Bureaucracy, the Big Business and the Politicians started a conspiracy against him.[40] After the "Operation Fairplay" on July 5, 1977, they started finding ways and means to tarnish his popularity and ultimately adopted the way of issuing White Papers and registering various cases against him.

Misfortunes seldom come alone. The political murder case of Nawab Mohammad Ahmed Khan was not the only case filed against him. A large number of other cases ranging from the buying of poodles to the murdering of people were also filed. Commenting on the cause of these cases Mr. Bhutto said, "It gives no pleasure to an individual to go to the courts even at the best of times. But these cases and the projection of these cases and the material being used or provided for cases to be lodged are part of a much bigger strategy. One of its objectives is to pin me down to legal courts so that I should be in the Courts rather than among the people". Some of the cases reported to be filed against him and his colleagues in different courts of the country by September, 1977 were as follows:

1. Nawab Mohmd. Ahmed. Khan murder case (Lahore High Court).

2. Mr. Bhutto was accused of subverting the Constitution and committing high treason[41] in a complaint filed by Chowdhry Zahur Ilahi, former member, National Assembly, with the district Magistrate, Lahore under Article 6 of the Constitution, read with Section 2 of the High Treason (Punishment), Act, 1973.

   The complaint was based on the excesses alleged to have been committed by Mr. Bhutto to bring his political opponents to their

[40] If I am assassinated", Z. A. Bhutto, p. 61.
[41] *Pakistan Times, August 19, 1977.*

knees; the misuse of funds by him and his party and betrayal of trust reposed in him by the Constitution. The complaint stated that in order to perpetuate himself and his party in office, and to destroy the Opposition, Mr. Bhutto used the Federal Security Force exclusively for political purposes to browbeat, harass and even physically eliminate his political opponents.

Quoting glaring instances of the alleged misuse of public funds, the complaint stated that two air-conditioning plants, worth Rs. 5,60,000 and Rupees 6,50,000 were installed in the personal houses of Mr. Bhutto at Larkana and Karachi, respectively. The payment in respect of these plants were alleged to have been made out of public funds and Mr. Bhutto procured the transfer of these plants to himself for the paltry sum of Rupees 1,40,000. Bathroom fittings were also alleged to have been specially imported through the good offices of the foreign office. After entertaining the complaint, the district Magistrate transferred the case to the Sessions Judge, Lahore, because offences entailing punishment of death or imprisonment were exclusively triable by the Sessions Court.

3. Writ petition against illegal detention of General Yahya Khan **in** Lahore High Court.

4. The Liaqat Bagh firing case, in Lahore High Court.

5. The case regarding the abduction and illegal custody of Mian Iftikhar Ahmed Tari, in Lahore High Court.

6. The case regarding the abduction and illegal custody of Abdul Waris, in Lahore High Court.

7. The case regarding the disappearance of Abdullah Mengal, s/o Sardar Ataullah Mengal in Lahore High Court.

8. The contempt of court petition filed by Mr. Ahmed Raza Kasuri in Lahore High Court.

9. The case filed by Mr. Yusuf Lodhi regarding the country's break up of Pakistan and surrender at Dacca in Lahore High Court.

10. The treason case in the Court of District Magistrate Multan.

11. Mrs. Saeeda murder case (District Magistrate Tharparkar).

12. Contempt of Court case filed by Ch. Zahur Ilahi (City Magistrate, Lahore).

13. Suhail Shauni murder case.

14. The case filed by Altar Malik, regarding the contempt of Quaid-e-Azam and Quade Milat.

15. The contempt of court case filed by Main Iftikhar Tari in Lahore High Court.

16. The contempt of court case filed by Chowdhry Irshad Ahmed in Lahore High Court.

17. The Lahore High Court ordered the Police on January 11 to register a case against Mr. Z. A. Bhutto, for uttering threatening remarks against the Acting Chief Justice in the course of trial proceedings.[42]

    An F.I.R. was later lodged by the Superintendent of Police escorting Mr. Bhutto with the old Anarkali Police Station, Lahore.

18. The Federal Investigation Agency registered a case against Mr. Bhutto under Martial Law Regulation for the misuse of powers and corruption.[43]

    The case was registered on the "baseless and false" income returns filed by Mr. Bhutto on the ground that in these he had not supplied correct information about his movable and immovable property.

    According to the F.I.R. Mr. Bhutto did not supply correct information about his property, namely, the Al-Murtaza; a farm in Naodero, a but set up near Larkana worth several *lakh* rupees, possessing the latest and modern facilities at his residence 70, Clifton Road in Karachi; Mr. Bhutto had also not declared Mercedes car model 1971. The F.I.R. also said that Mr. Bhutto, in collusion with former Federal Minister Rafi Raza, illegally acquired 12 Irani Jeeps "*Shahbaz*" which were meant for the Government and distributed them among his personal servants. Property worth Rs. 10 *crore* was not shown in the returns filed with the Government.

19. Three murder cases were filed in a Karachi Court on January 19

[42] *Pakistan Times*, January 12, 1979.
[43] *Morning News*, January 13, 1979.

against Mr. Bhutto, former Sindh Chief Minister Ghulam Mustafa Jatoi, a Deputy Commissioner and some police officials on the basis of three complaints registered by Maulana Abdul Qudos Bhari, president of the Mohajir Relief Committee.[44]

The Pakistan Government filed five more cases against Mr. Bhutto, in a special court, consisting of Mr. Justice Shafi-ur-Rehman[45] on February 2, 1978.

The Court was set up on January 6 under Article 4 of the Holding of Representative Offices (Punishment for Misconduct) Order, 1977.

20. The first case was based on the so-called facts revealed by inquiries that massive illegalities and malpractices committed before and during the March, 1977, elections were part of a plan prepared by Mr. Bhutto and his close associates to ensure PPP victory in the polls.

21. The second case against Mr. Bhutto pertains to the declaration of assets. According to his declaration, he possessed properties and assets valued at Rs. 17,52,948 only, whereas the conservative estimates of his known assets in Pakistan alone is over Rs. 5 crores.

    This wide disparity between the two figures was alleged due to the fact that Mr. Bhutto not only unduly undervalued his assets but also concealed some of his properties such as land, houses and vehicles.

22. The third case alleged misuse of Govt. funds to the tune of Rs. 90 *lakhs* for the development of his private lands in Larkana district.

    According to the available evidence, Mr. Bhutto and his family owned 2,200 acres of agricultural land in Dera Bhutto. These lands are commonly known as Z. A. Bhutto Farm or Nusrat Farm.

    To protect his holding from the Land Reforms Act, Mr. Bhutto contrived to transfer a part of this land to some trusted and dependable persons. But this transfer remained only a paper transaction. The actual control continued to be exercised by Mr. Bhutto or his representatives, according to the complaint.

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44 *Mashrig*, January, 20, 1979.

45 The Times of India, February 2, 1979; Pakistan Times, Feb. 3, 1979.

23. The fourth case concerned an illegal expenditure of Rs. 60 *lakhs* from the public exchequer on structural improvement, alteration, air-conditioning and maintenance of his houses at Larkana and Karachi.

24. Misappropriation of the Secret Service Fund for the benefit of his PPP was the fifth charge against Mr. Bhutto. According to the case, during his tenure as President and Prime Minister of the country, Mr. Bhutto had spent over Rs. 1.92 *crores* from the Secret Service Fund. Inquiries into part of this expenditure have revealed that money was dishonestly misappropriated even to benefit the PPP.

    False certificates were prepared by Mr. Bhutto declaring the fund to have been properly spent in public service.

    Inquiries have established that Mr. Bhutto had advanced, out of the Secret Fund, *lakhs* of rupees to the office-bearers of his party which were mainly misused for payment of salaries to the staff of the party, monthly and *Eid Indian* parties of PPP members.

    According to available evidence, Mr. Bhutto had also used the Secret Service Fund for the purchase of a jeep which was later transported to his ancestral borne at Larkana for private use.

    Evidence has also been found to establish that purely party ventures like printing of manifestos were also financed from the Secret Service Fund, the complaint added.

    The court issued notices for February 21, 1979, for the hearing of the cases. Mr. Bhutto could be imprisoned for seven years on each of the charges. He could also be fined the sums misused.[46]

25. The Lahore Police registered on June 16, 1978 a case against Mr. Bhutto and 19 others for their alleged involvement in the October 1975 incident at Tajpura ground.

    According to the F.I.R., Mr. Ghulam Mustafa Khar had disguised himself as an Opposition candidate and was acting at the behest of the former Prime Minister to hold a public meeting at Tajpura which was intended to eliminate those, who were opposed to Mr. Bhutto's Government. The public meeting was disturbed as a result

[46] *Times of India,* February 2, 1979.

of firing and many people were either killed or wounded.

Those named in the complaint included Mr. Abdul Hafeez Pirzada, Dr. Mubashir Hassan, Mr. Sadiq Hussain Qureshi, Mr. Mairaj Khalid, Syed Nasir Ali Rizvi, Mr. Hafeez Ullah (DC Lahore), Mr. Masood Mehmood (former Director General of the defunct FSF) and Rao Abdul Rashid (the former .LG. Punjab).

26. A special investigating team was set up to probe all over Pakistan to expose the "atrocities committed during the PPP rule", following disclosures made by the Defence Minister, Mir Ali Ahmad Khan Talpur about mass graves of several politicians killed during the Bhutto regime.[47]

The Pakistan Television started a new programme entitled *"Zulm Ki Dastan"* (the story of tyranny) in which the alleged victims of the Bhutto regime were to relate their experiences and sufferings at the various interrogation centers like those at the Dalai Camp, the Lahore Fort and the Warsak Rest House. It seems that the programme was aimed at maligning Mr. Bhutto and prejudicing the minds of the Judges of the Supreme Court, who were due to deliver their judgment on his appeal against the death sentence awarded to him by the Lahore High Court.[48]

Many other allegations were also allegedly trumped up against Prime Minister in the White Papers issued by the Pakistan Government, and many had been incorporated in this chapter because of the non-availability of information.

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47 *PPP,* January, 2, 1979.

48 *Musawwat,* January 22, 1979.

Lahore High Court Judgment

Arms and laws do not flourish
Together

Plutarch

In the history of the world, next, to the injustices perpetrated on the field of battle are injustices perpetrated in Courts of Law. Law Courts have provided the easiest and the most innocuous-looking weapons in the hands of oppressors. Law Courts have often been used as instruments of revenge or to settle political scores.

The deviation has certainly been pronounced in Bhutto's trial. General Zia insisted that the judiciary in Pakistan was "independent". This assertion however, ignores the manner in which judges were knotted into the fabric of the Pakistani administration. They were serving as Provincial Governments.[49]

The most significant feature of this trial is the role of Chief Justice Maulvi Mushtaq Hussain.

In January, 1969 Maulvi Mushtaq Hussain had heard the detention petition of Mr. Bhutto "in camera" inside the prison walls of Lahore Camp Jail, from where the latter was released when the government withdrew the detention order, in view of the then prevailing circumstances.

Throwing some light on the character and his relation with Maulvi Mushtaq Hussain, Bhutto remarks:[50]

"With the change in the situation, Maulvi Mushtaq Hussain met me in the Punjab House in Rawalpindi soon after I became President of Pakistan. He gave blatant indications of his ambitions, suggesting that at this critical junction in the history of Pakistan, the new President would need a trustworthy man in control of the judiciary. He was gravely dejected when his expectations were not met, when a few months later Sardar Mohammad Iqbal was appointed the Chief Justice of the Lahore High Court by my Government,

49 The Illustrated Weekly of India, April 9, 1978.
50 "If I am assassinated", Bhutto, pp. 37-38.

"He did not conceal his anger. He displayed his resentment in many ways, both in his official capacity and otherwise. When, following the Constitutional Amendment, Mr. Justice Aslam Riaz Hussain was appointed the Chief Justice of Lahore High Court, he interpreted this second supersession to be an intolerable insult, to the extent that gave vent to his pent up anger on the very first day of the murder trial, by pointedly referring to his supersession as 'a hypothetical case'.

"Earlier, in the Fall of 1975, he had an unpleasant and unmentionable altercation with Mr. Abdul Hafeez Pirzada, a senior Federal Minister. After his second supersession he did not seriously attend to his official functions, spending most of his time brooding away in his chambers. On the slightest pretext he would fly off to Europe to sublimate. He was in Europe when the *coup d'etat* of 5th July 1977, took place. He was summoned to Pakistan by the ring leaders of the *coup* to become a member of the inner circle. He responded to the invitation with the enthusiasm of a fanatic.

"In anticipation of the meritorious services he was to render, he was immediately rewarded with the office of the Acting Chief Justice of Lahore High Court. He was confirmed as Chief Justice during the course of my trial for murder. Simultaneously with his appointment as Acting Chief Justice of Lahore High Court he was appointed as Chief Election Commissioner. He baptized this appointment with a vicious attack on the Pakistan People's Party and my Government in an interview which was heard on the radio and television.

"He took over the murder trial on 13th September 1977, ousting the Divisional Bench of Mr. Justice Samdani and Mr. Justice Mazharul Haq, who were already dealing with the same case, until the announcement of the judgment on 18th March 1978."[51]

It became abundantly clear that the Chief Justice's conduct towards the accused was extremely shabby. In the course of the secret proceedings of the Lahore trial, addressing Mr. Bhutto with taunting smile and sarcasm, the Chief Justice observed, "If you claim to be a student of history as I am informed you also claim to be a maker of history."

Furthermore, the panel of five judges that he constituted with himself as President did not include either Justice Samadami or Justice Mazhar-ul-Haq both of whom had before the transfer of the case to the High Court been seized of the matter of the charges of murder made by Ahmad Raza Kasuri. Justice Samadani was not included in the panel because on September 13 he had enlarged Mr.

[51] "lf I am assassinated", Bhutto, p. 43.

Bhutto on bail. The exclusion of these judges later assured a unanimous verdict.[52]

In order to elucidate the strained personal relationships between the Chief Justice and the accused, I narrate just one incident. Inspector Ghulam Hussain, a witness who had received pardon, stated that a plot to murder Justice Jamil Hussain Rizvi had also been hatched. By a slip of the tongue the witness instead of saying "Justice" Rizvi used the word "Chief Justice". The Chief Justice, Maulvi Mushtaq Hussain remarked with a smile: "Don't say Chief Justice but simply Judge. The turn of the Chief Justice has not yet come." Mr. Bhutto retorted in an undertone, "Don't worry, it will also come." The Chief Justice was so upset with this remark that he ordered the Superintendent of Police present in court to take note of the remark and record it in the nearest police station so that if any untoward incidents took place, it would help in identifying the perpetrator. The Superintendent of Police made an entry of Mr. Bhutto's threat to the Chief Justice at the Anarkali Police Station. This does not reflect well on Chief Justice Maulvi Mushtaq Hussain's objectivity and broadmindedness.[53]

On one occasion there were altercations between Mr. Bhutto and the Chief Justice. The incident was sparked off when, departing from the normal practice, the court advanced the tea break and Mr. Bhutto instructed his counsel to request the court to either have an extended break till 11.15 a.m. or postpone it till the usual hour of 11.00 a.m. the reason, he gave, was that the senior defence counsel, Mr. Yahya Bakhtiar, had gone to the hospital to enquire about Begum Bhutto who had been injured in the course of a public demonstration on December 16. Mr. Bakhtiar would be back only around 11.00 a.m. when he wanted to confer with him, Mr. Bhutto said. However, when the counsel requested the court for an extended break without explaining the reason, Mr. Bhutto stood up and said, "Damn it Awan, you tell the Court the true reason." Upon this, the Acting Chief Justice told Mr. Bhutto that he would not be allowed to use indecorous words in the court. Mr. Bhutto denied having used indecent words and offered his apologies if there was an impression that he had done so. He explained that he was very upset.

Mr. Justice Mushtaq: We are not concerned with your being upset. You have used improper language. You have been unmindful of the Court's decorum. This will not be allowed.

Mr. Bhutto: I have not been disrespectful to the Court. Mr. Justice

Mushtaq: You have done it.

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[52] The Illustrated Weekly of India, April 30, 1978.
[53] The Illustrated Weekly of India, April 30, 1978.

Mr. Bhutto: I have had enough.

Mr. Justice Mushtaq: What have you had.

Mr. Bhutto: I have been insulted and humiliated.

Mr. Justice Mushtaq Hussain then addressed the S.P. and said: Take him out and do not bring him back until he comes to his senses.

Later, Mr. Justice Mushtaq Hussain addressing Mr. Bhutto's counsel said: "Mr Awan, tell your client to behave in the court otherwise he will be administered exemplary punishment under the Jail Manual that he will remember for his whole life."

The court adjourned at 10.30 a.m. and reconvened at 11.15 a.m. but Mr. Bhutto was not allowed to join the proceedings.[54]

The Court later ordered on December, 17 that the case be conducted in the absence of the principal accused, Mr. Bhutto.[55]

The Acting Chief Justice held that Mr. Bhutto was "Not in a position to participate in the proceedings". The counsel for Mr. Bhutto, disputed this and submitted that his client had no difficulty in being present; but the court refused to consider his plea on the ground that "orders have already been passed". The Acting Chief Justice told Mr. Bhutto's counsel, "Tell your client that he is in custody. He can be punished. Then, he will regret it".

As the court resumed hearing of the case on January 24, Mr. Bhutto decided against making any statement in his defence.[56] Mr. S. H. Qureshi started reading the questions under Section 342 of the Cr. P.C. and his first question was: "Did Ahmad Raza Kasuri, prosecution witness, belong to your party (PPP) having been a founder-member of the party and elected on its ticket to the National Assembly from Constituency No. NA. 65 in 1970"?

Mr. Bhutto: Since I am boycotting the proceeding of this trial, I will not be offering any defence. I have withdrawn the *Vakalatnamas* of all my counsel on January 10 last, after my applications of December 18 and 22, 1977 were dismissed by this Bench in Chambers. I will confine my statement mainly to two issues: (1) Why is this trial taking place and a case has been fabricated against me ? and (2) Regarding my lack of confidence in getting a fair trial. As for other

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54 *Daily Hayat,* December 18, 1977.
55 *Nawai Waqt,* December 18, 1977.
56 *Pakistan Times,* January 25, 1978.

questions, if they do not directly pertain to my own defence it will be belittling to give the answers. I have nothing to say on this question.

At this stage, the Chief Justice told Mr. Bhutto that he would be at liberty to say whatever he wanted to in reply to the last question which would precisely enquire from him why this case had come up against him.

Mr. Justice Qureshi then resumed his questions.

Q: Is it a fact that differences arose between you and Mr. Ahmad Raza Kasuri when in spite of your warning given in a statement at Peshawar that the PPP would not be attending the forthcoming session of the National Assembly scheduled to be convened on March 3, 1971 at Dacca, that whoever would go to Dacca to attend the session for the National Assembly, his legs would be broken', Mr. Ahmad Raza Kasuri was the only member of the PPP who went to Dacca to attend that session?

A: The same answer.

Q: Is it a fact that differences also arose between you and Mr. Ahmad Raza Kasuri over the issue of Progressive Papers Limited when he went on a hunger strike to liberate the occupied Press in Pakistan; you knowing that you would be using this powerful organ once you came into power were not at all interested in the liberation of the Press and doing away with the National Press Trust, which was of one the demands of strikers, and when you visited the hunger strikers in the Gol Bagh, Lahore, in spite of your request to break the fast, they refused to do so at which you took out your pen and in a very angry way offered to resign the Party Chairmanship in favour of Mr. Ahmad Raza Kasuri?

A: The same answer but since the question of Gol Bagh has nothing to do with my defence, I must say that it was properly called Nasser Bagh in deference to a great Arab leader who did not betray the cause of the Arab world.

Q: Is it a fact that the immediate reaction of your political difference with Ahmad Raza Kasuri was on May 2, 1971, when you visited Kasur and addressed PPP workers in Habib Mahal Cinema, your supporters resorted to an attack on Ahmad Raza Kasuri as a result of which his hand was fractured?

A: The same answer.

Q: Is it a fact that on the same day you suspended Ahmad Raza Kasuri's primary membership of the PPP although he was MNA elect on that Party ticket and was also Chairman, PPP, Kasur?

A: The same answer.

Q: Is it a fact that on the same day, Ahmad Raza Kasuri in a Press Conference announced the formation of his own group in the party known as PPP Raza Progressive Group?

A: The same Answer.

Q: Is it a fact that on January 17, 1972, shortly after you took over as President and Chief Martial Law Administrator, an attack was launched on Ahmad Raza Kasuri at Kasur in which three bullets hit him in legs and his brother, Khizar, received injuries?

A: The same answer.

Q: Is it a fact that Ahmad Raza Kasuri who did not accept the recognition of Bangladesh expressed the opinion on the floor of the National Assembly that Bangladesh was an illegitimate child of your power ambition?

A: The same answer except that in December, the President of the so-called illegitimate child visited Pakistan and was very warmly received by the authorities.

Q: Is it a fact that Ahmad Raza Kasuri had also expressed on the floor of the House that 94,000 POWs were locked up because of your connivance with the Indian Government?

A: The same answer except that it is preposterous for any Pakistani to think that I would connive with India, a country against which I had mobilized people to wage a 1,000 year war.

Q: Is it a fact that as a result of your difference with Ahmad Raza Kasuri you formally expelled him from the PPP in October 1972?

A: The same answer.

Q: Is it a fact that notwithstanding the above, Mr. Ahmad Raza Kasuri opposed on the floor of the House all the laws introduced by the Party leadership meant to throttle a voice of dissent in Pakistan and in particular the Federal Security Force Law?

A: The same answer.

Q: Is it a fact that Ahmad Raza Kasuri had neither signed nor voted for the

permanent Constitution of Pakistan of 1973 but when on June 3, 1974, you while addressing the Parliament, mentioned that the Constitution had been unanimously passed and upon this Ahmad Raza Kasuri interjected and pointed out that nine persons had not signed the Constitution, you lost your temper and pointing your finger to him said: "I have had enough of you. I will not tolerate your nuisance. I have had enough of this man"; and virtually a Parliamentary scuffle took place between you and Ahmad Kasuri on the floor of the House?

A: The same answer but two comments which do not have a direct bearing on my defence. Firstly, I think the Court can take judicial notice of the fact that the Constitution of 1973 was unanimously approved by a democratically elected Parliament. All leaders of all parties in the National Assembly not only approved it but also signed the principles of the Constitution in October 1972 and thereafter the Constitution itself in April 1973. What makes a Constitution unanimous is the approval by all parties and not each and every individual of a Parliament. Hence, the 1973 Constitution is a democratic Constitution and a unanimous Constitution.

Secondly, in Parliamentary debate we have heard the great Prime Minister Winston Churchill of Great Britain lost his temper repeatedly so to speak and on one occasion referring to Mr. Anurin Bevan, he said pointing to Mr. Bevan: The end is nigh, which meant that your end was coming. In our Parliament we had many such exchanges. In 1973 or 1974, Mr. Abdul Wali Khan shouted in the Parliament at Mr. Abdul Hafeez Pirzada and said: 'I will wring your neck and I will shoot your Prime Minister (or President).' I think I was President at that time. The Speaker had expunged the remarks regarding shooting but allowed the word about wringing Mr. Pirzada's neck.

Q: Is it a fact that the next day, *i.e.,* June 4, 1974, Ahmad Raza Kasuri moved a privilege motion in the National Assembly alleging that some *goondas* were looking for him which fact he attributed to the altercation with you the previous day?

A: The same answer.

Q: Is it a fact that you did not approve of any criticism from within or your party of your external and internal policies?

A: This question has no bearing on the case but has a bearing on my temperament. This is absolutely incorrect. I am a politician, have been in politics all my life. You cannot have politics without dissent. I am a man of consensus. I have had long meeting of my Central Committee and the Cabinet which sometimes went on for 24 hours non-stop. Besides, people have disagreed with me. This is known both inside and outside my party. Some had left the party

because of a disagreement with me. I am a graduate of one of the best universities of the world. How can any one make such an observation?

Q: Is it true that because of your differences with Ahmad Raza Kasuri as brought out in evidence, you had issued a notice to eliminate him by getting him murdered?

A: The same answer.

Q: Is it a fact that Saeed Ahmad Khan, a dismissed police officer who was known to you before, was sent for by you and you appointed him Chief Security Officer to the President and later the Prime Minister in spite of the fact that he was a dismissed public servant and got his salary paid from August 11, 1972, from the Secret Fund of the Government and from December 8, 1972, by the device of showing him as legal and administrative consultant to the All Pakistan Research Organization under the aegis of the Cabinet Division and utilized him, mainly to advise you on political issues in the country to keep you abreast on political activities and to supply important and daily Intelligence reports from various Intelligence agencies?

A: The same answer. Few brief comments, however. The All Pakistan Research Organization was basically Intelligence agency and a cover front had been used. Secondly, being a politician I do not take advice from bureaucrats. Thirdly, I believe that dismissed Government servants are being reinstated by the present Government.

Q: Is it a fact that when Saeed Ahmad Khan's work load increased and he asked for assistance, the late Abdul Hameed Bajwa was appointed in the beginning of 1973 as Officer on Special Duty to assist him. This appointment was made at your insistence and because you considered him to be a useful man who would be a specialist for Punjab affairs?

A: The same answer.

Q: Is it true that Abdul Hameed Bajwa was called for interview telephonically by you over the head of Saeed Ahmad Khan and was given direct assignment and that he would also send his reports to you directly ?

A: The same answer. However, one or two factual assertions, I did not know about the existence of Mr. Bajwa until Saeed Ahmad recommended him. Secondly, I did not need the services of an unknown individual to guide me on Punjab affairs. Thirdly, I do not understand the expression used by some of the prosecution witnesses that officers were called over their head. A Prime Minister or President has the very right to call officers in the establishment. I do not

understand the expression 'over the head'.

Q: Is it a fact that Saeed Ahmad Khan appointed as Chief Security Officer started under your directions a personal file of Ahmad Raza Khan Kasuri in December 1973 which is in three volumes produced in evidence?

A: Same answer except that since the British times the DIB, the DG, ISI, Special Branches of Provincial Governments and District Magistrates kept copious files on prominent individuals. This practice has continued from those days to our times.

Q: is it correct that Intelligence agencies used to collect reports about the activities of Ahmad Raza Kasuri and also the tapping of his telephone which reports you used to see and also put your signatures at your note in token of your having seen it *vide* a report produced in evidence.

A: I could have given an elaborate and direct answer but since I am boycotting the proceedings, the answer is the same.

Q: Is it a fact that in a meeting Masood Mahmood (approver) had with you prior to his taking over as Director General Form, you told him not to terminate the services of re-employed officer in the FSF without your prior permission because, according to you they were very useful officers and you particularly mentioned Mian Abbas (co-accused) then Director, FSF?

A: My answer is the same so far as my defence is concerned. But the name co-accused had been mentioned and I should clarify with regard to him. It is my moral obligation to give a true version. I have had no communication with him but the factual position is that I did not know he was in charge of Intelligence. First time I heard of him was in late 1976 when Masood Mehmood told me that a very competent officer had suffered a heart attack and was hospitalized and his burden had increased. I then knew of a man called Abbas. The first time I saw him was in this court.

Q: In the same meeting with Masood Mehmood you told him that he was expected to raise the FSF into a deterrent force by which term you meant that the people of Pakistan, your Ministers MNAs and MPAs should fear it. You further directed him in this context that FSF was going to be used as an instrument by you for your political purposes including: (a) breaking up of political meetings; (b) harassment of persons both in your party and the Opposition; and (c) induction of FSF men in plain clothes in public meetings addressed by you to swell the crowds?

A: The question has two parts—one relates directly to my defence for which

I offer no comments and the other to an institution and its objectives. The charges are false and concocted. The FSF was established by me as a Federal Civil Force as is the practice in almost all Federations of the world. I might be wrong but I doubt if there is any Federation without a civil militia.

Q: Is it a fact that you directed Masood Mehmood to be present at all places where you toured and also to be present in the National Assembly when you attended the session or when you were in your chambers in the Assembly?

A: The question has no bearing on my defence. I did not need such a *Rustame Zaman* as to be present wherever I was.

Q: Is it a fact that a day or two before your altercation with Ahmad Raza Kasuri in the National Assembly in June 1974, you sent for Masood Mehmood and told him that you were fed up with the obvious behavior of Ahmad Raza Kasuri and that Mian Abbas Director FSF, knew all about his activities and had already been given directions through the previous Director-General to get rid of Ahmad Raza Kasuri? You then instructed Masood Mehmood to ask Mian Abbas to get on with the job and to produce the dead body of Ahmad Raza Kasuri or his body damaged all over. You further told him that you would hold him personally responsible for the non-execution of these orders?

A: Same answer.

Q: Is it true that when Masood Mehmood pleaded with you against the execution of such orders you lost your temper and shouted at him saying you will have no nonsense from Mian Abbas and then raising your voice you said; 'You do not want Viqar chasing you again. Do you?'

A: The same answer.

Q: Is it a fact that in this meeting with Masood Mehmood you entered into a conspiracy with him to commit the murder of Ahmad Raza Kasuri through the personnel of FSF with the active aid and abetment of Mian Abbas co-accused?

A: The same answer.

Q: Is it a fact that after giving the above orders to Masood Mehmood you kept on reminding and goading him for their execution? This you did personally as well as on the green telephone and through Saeed Ahmad Khan and his assistant Bajwa?

A: The same answer.

Q: is it a fact that on July 29, 1975 during your visit to Quetta, *i.e.,* some time after you had given orders to Mehmood you asked him to take care of Ahmad Raza Kasuri who was likely to visit Quetta, that in pursuance of these instructions of yours, Masood Mehmood asked MR Welch, then Director, FSF, Quetta, that some anti-State elements of which Ahmad Raza Kasuri was one had to be got rid of; and that Masood Mehmood had later himself reminded Walch about it?

A: The same answer.

Q: It has come in evidence that in pursuance of your aforesaid orders and conspiracy, Ahmad Raza Kasuri on August 24, 1974 at 3.30 p.m. while driving from the National Assembly towards the place of his residence was fired at from a blue jeep of the FSF. The shots had been fired from a sten gun by Mulazin Hussain under the supervision and instructions of Ghulam Hussain (approver), both of the FSF. A case was registered in respect of the firing at P.S. Islamabad on the same day bearing F.I.R. No. 346, dated 24.8.1974 which case was, however, later on 5-10-1974 filed by the Police as untraced. What have you to say?

A: The same answer.

Q: It is in evidence that the failure of the attempt of personnel of FSF to kill Ahmad Raza Kasuri at Islamabad on 28.8.1974 had made you angry. What have you to say?

A: The same answer.

Q: Is it a fact that after the above mentioned firing on Ahmad Raza Kasuri at Islamabad, you reminded Masood Mehmood saying that nothing tangible had taken place whereupon Masood Mehmood again reminded Mian Abbas and the latter assured him that the order would be obeyed?

A: The answer is the same, my Lord, except that I do not remind all my subordinates. It seems from these proceedings that I reminded everyone except *Nawai Wagt.* The whole world comes in except *Nawai Wagt.*

Q: Is it a fact that on account of the inability of FSF to murder Ahmad Raza Kasuri, you abused Mian Abbas, (co-accused), in about the middle of October 1974?

A: The answer is the same but I do not abuse people.

Q: It is in evidence that in pursuance of your conspiracy and procured abetment, Ahmad Raza Kasuri while returning from the house of Syed Rashid

Shah in Shadman Colony where he had gone to attend a dinner-cum-*qawaali* function in connection with a wedding was fired at on the night between November 10 and 11, 1974, shortly after midnight. He was at that time driving his Tayota Mark-I which was occupied also by his father, Nawabzada Mohammad Ahmad Khan (deceased), on the front seat beside him, his mother on the rear seat behind and his aunt on the rear seat behind Nawabzada Mohammad Ahmad Khan. Ahmad Raza Kasuri had hardly reached the Steadman/Shah Jamal roundabout, which was about 70 yards from the house of the said Bashi Shah, when a burst of fire hit his car putting out its lights. This was followed by repeated bursts of fire with an automatic weapon but Ahmad Raza Khan Kasuri managed to speed up. On reaching near the house of Muzaffar Ali Qazilbash he discovered that his father had been hit by a bullet whereupon he drove the car to the UCH where Nawabzada Mohamad Ahmad Khan was operated upon but he succumbed to his injuries at 2.55 a.m. on November 11, 1974. What have you to say?

A: The same answer.

Q: Is it a fact that as a result of the firing, a bullet hit the wall of a nearby bungalow from where it was recovered. The car of Ahmad Raza Kasuri was ridden with bullets, the glass of the rear right window was smashed and its lights went off. What do you say?

A: The same answer.

Q: Is it correct that the murder of Nawabzada Mohammad Ahmad Khan had been committed and the murderous assault on Ahmad Raza Kasuri made, as described above, by Arshad Iqbal and Rana Iftikhar Ahmad (co-accused), with the aid and assistance of Ghulam Mustafa (co-accused), in pursuance of a conspiracy between yourself, Masood Mehmood and Mian Abbas, and at your abetment?

A: The same answer except that other co-accused and Ghulam Hussain had been seen by me for the first time in this court.

Q: It is in evidence that in consequence of the firing, the clothes which the deceased was wearing at the time of occurrence also got blood-stained and a *Karakult* cap which he had on his person bore a hole mark. Have you anything to say?

A: The same answer.

Q: Is it a fact that broken pieces of glass and blood had been recovered by the Police from inside the car of Ahmad Raza Kasuri?

A: The same answer.

Q: Is it correct that one lead bullet and two metallic pieces were recovered from the head of the deceased in the course of his postmortem examination and had been secured by the Police.

A: The same answer.

Q: It is in evidence that 24 empty cartridges bearing inscription 661/71 on the base of each one of them were recovered from four different points at the scene of occurrence and a lead bullet from near the points at the scene of occurrence, and a lead bullet from near the wall of a nearby bungalow which had a bullet mark by SHO Abdul Haye Nizi. What have you to say?

A: The same answer.

Q: is it a fact that no recovery memo was prepared in respect of the said 24 empties and lead bullet because of directions given by Abdul Ahad and under instructions of the then Inspector-General of Police and these articles as well as the cap of the deceased were taken to the IGPs house by DSP Abdul Ahad who was accompanied by SHO Niazi? The empties and lead bullet were retained by the IGP and the DSP left for Rawalpindi on November 23, *1974* and on his return from there two or three days later, he directed SHO Niazi to prepare a recovery memo in respect of empties in accordance with a draft which he gave to the SHO and which draft, according to him, had been given to him by the Prime Minister's House.

The SHO thereupon under threat and coercion prepared a postdated recovery memo bearing the date 11-11-1974 wherein he, as per draft, described the inscription on the 22 empties as BB 1/77 and on the remaining two as 31/71 while making no mention of the lead bullet. The 34 empties were not even returned to the SHO. Have you anything to say?

A: The same answer but the Prime Minister's House had been referred to in the proceedings quite frequently. I would like to explain that the PM's house contains the residence of the Prime Minister as well as the Secretariat. In other words, the Secretariat and the House are in the precincts of the same house. It has a vast Secretariat, an auditorium for conferences and Press conferences and meetings and a Cabinet Room. The House also contains the residence of the Military Secretary and some other staff.

Q: It is in evidence that Abdul Hameed Bajwa purporting to work under your directions interfered with that investigation of the case. What you have to

say?

A: The same answer.

Q: It is also in evidence that in spite of the empties having been recovered on 11-1-1974 they were neither sealed nor deposited in the *Malkhana* and a back-dated entry regarding their deposit in the *Malkhana* of Police Station Ichbra, was made on *17.11.1974* ostensibly dated 11.11.*1974,* although the empties even then had not been made over to the officials incharge of the *Malkhana.* What have you to say?

A: The same answer.

Q: It is in evidence that *24* empties were later handed over by DSP Ahad to SHO Niazi on 23-11-1974 which were ultimately sent to a ballistic expert. What you have to say.

A: The same answer.

Q: Is it a fact that a meeting was held in the house of the Inspector General of Police at Lahore on the evening of 11-11-1974 and was attended among others by Abdul Hameed Bajwa. The I.G. ordered the SSP Lahore, to remove the dead body of the deceased from his house and bury it somewhere but when the SSP refused to do so, the IG threatened him that if anything happened the next day the SSP would be taken to task?

A: The answer is same.

Q: Is it a fact that on receipt of the news of the murder at Multan where you then were on a visit, you rang up Masood Mehmood who was also campaigning there, early in the morning of November, 11, 1974 and told him "Your Mian Abbas has made complete balls of the situation. Instead of Ahmad Raza Kasuri he has got his father killed?" Later the same day when Masood Mehmood appeared before you, you had said in the presence of Mr. Sadiq Hussain Qureshi, "I hear Mr. Ahmad Raza Kasuri's father has been killed last night at some place in Lahore", what have you to say?

A: The same answer.

Q: Is it a fact that on return to Rawalpindi from Multan you sent for Masood Mehmood; you appeared to be agitated and told him that the actual task had yet to be accomplished but in spite of his refusal to comply with your orders any more, you continued to goad him even later into getting Ahmad Raza Kasuri assassinated?

A: The same answer.

Q: Is it true that after Masood Mehmood had said categorically no to your orders, an attempt was made on his life and attempts were also made to kidnap his children?

A: The answer is the same but the contradiction is self-evident.

Q: It is in evidence that the F.I.R. recorded in this case having been brought to your notice by Saeed Ahmed Khan through his note dated 24-11-1974 suggested that the F.I.R. could have been registered by the police and further informing you that the F.I.R. had been sealed. You made on endorsement thereon: “I agree with you”. What have you to say?

A: The same answer.

Q: Is it a fact that in early January 1975 when in the proceeding before the Special Inquiry Tribunal presided over by Mr. Justice Shafi-ur-Rehman, your name was mentioned that you phoned Saeed Ahmed Khan and expressed annoyance at his being in Rawalpindi at a time when your name was mentioned before the Tribunal and asked him to proceed to Lahore, meet the Advocate General, the Chief Secretary, the IGP and investigating officers and to look into the case?

A: The same answer.

Q: Is it a fact that Saeed Ahmed Khan, as instructed by you, came to Lahore, held a meeting with the Advocate-General and the concerned officials of the provincial government and investigating officers and succeeded in preventing the usual investigation of the case and put it on line so as not to implicate you or the FSF?

A: The same answer.

Q: It is further in evidence that when Saeed Ahmed Khan met you on return from Lahore and conveyed his impression that empties used in the offence were of 7.62 mm. bore which indicated the use of Chinese weapons which were in use of FSF, you put him off by saying that Chinese weapons were also issued to Army units and were smuggled as well into Pakistan. You then directed him to find out from the Joint Army Detective Organization whose main task was to find out and control illicit traffic of arms in the country. You also directed him to write to the Secretary Ministry of Defence and find out which army units had been issued these Chinese weapons. You further directed him to make inquiries

from Bara as to the availability of such arms and finally told him to keep the FSF out. Have you anything to say?

A: My answer is the same but the contradiction and the inconsistency is self-evident. On the one hand, I am alleged to have put him off and, on the other hand, I am supposed to be deeply involved with him.

Q: Is it a fact that besides the aforesaid directions, you talked to Saeed Ahmed Khan about the family disputes of Ahmad Raza Kasuri his local political *rivalries* and previous litigation on the family and otherwise, and directed him to collect all evidence and to help the investigating officer in this matter by producing the material so available?

A: The same answer.

Q: It is in evidence that in pursuance of your instructions Saeed Ahmed Khan after obtaining the report from Joint Army Detective Organization wrote a DO letter on 17-1-1975 attaching therewith a copy of report of JADO and enquired from him about army units which used 7.62 mm. bore and when the Defence Secretary's reply was received that Chinese weapons were issued officially among others to the FSF, Saeed Ahmed Khan showed the reply to you and enquired whether the same be produced before the Tribunal at which you got infuriated and rebuked Saeed Ahmed Khan in the words "Have I sent you to safeguard my interest or to incriminate me? This letter will certainly be got produced before the Tribunal. You were trying to become over-clever and if you do not behave, you will suffer the consequences which your progeny will not forget". Saeed Ahmed Khan did not produce the reply before the Tribunal or the Police. What have you to say?

A: The same is the answer.

Q: It is in evidence that apart from your aforesaid directions to put the investigation of the murder case on wrong and unrelated lines and to withhold the relevant material from the Tribunal you also directed that such material be produced before the Tribunal by the investigating officer as related to the family. What have you to say?

A: My answer is the same.

Q: You ordered that the family disputes of Ahmad Raza Kasuri produced before the Tribunal be given wide publicity. In compliance with your order, Saeed Ahmed Khan addressed a letter to the Director-General Information and Broadcasting Division, Rawalpindi, on 1-2-1975, a copy of which was sent to you through your Secretary for your information and was initialled by you in token

of your having seen it. What have you to say?

A: The question is mainly relevant to my defence. My answer is the same.

Mr. Bhutto's examining was inconclusive, but it was held in camera[57] when it resumed on January 25.

The proceeding concluded at about 10.15 a.m. on January 25 to resume on January 28, when the still inconclusive statement of Mr. Bhutto was to be recorded.

Mr. Yahya Bakhtiar, counsel for Mr. Bhutto, told newsmen after having about a three-and-a half hour meeting with Mr. Bhutto in the office of the Registrar, Lahore High Court, that Mr. Bhutto had informed him that the Court had given strict orders that if a word of what had transpired there on January 25 appeared in the newspapers the Court would take strict and prompt action against him (Mr. Bakhtiar).[58] Mr. Bhutto requested the Acting Governor of Punjab, Mr. Justice, Islam Riaz to transfer the case from the Lahore High Court to some other High Court in the country in the interests of justice.[59]

He also requested that the present trial proceeding in the Lahore High Court be stayed till such an order is passed by the Acting Governor.

Giving reasons for his request, Mr. Bhutto said what the Lahore High Court was conducting was not a murder trial but the murder of a trial, pointing out that the Court had held an open trial when the prosecution was presenting its case, he had said that the Court was deliberately holding the trial in camera when it was his turn to expose their motive and conspiracy against him. The Court, thus, only wanted to award a death sentence to him without allowing him to defend himself, since it had already deprived him of his right to appeal to the Supreme Court. But the Acting Governor rejected the petition for transfer of case.[60]

Begum Bhutto made an application on March 11 that Bhutto's case may be transferred to Military Court for pronouncement of judgment but it was denied by the Martial Law Authorities.[61]

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57 *Pakistan Times,* January 26, 1978.
58 Ibid
59 *Musawaat,* February 27, 1978.
60 *Pakistan Times,* February 28, 1978.
61 *Times of India,* March 14, 1978.

The prosecution was allowed all latitude, the defence none. The prosecution submitted a list of witnesses which it was later allowed to alter. In the end, half the number of witnesses cited were not produced. Among these was the former Chief Minister of Punjab, Mr. Hanif Ramay, an arch enemy of Mr. Bhutto who was expected to be the star witness for the prosecution.[62]

The arguments were concluded on 2 March and the judgment was resumed presumably to allow the Martial Law Authorities enough time to make adequate arrangements to prevent any disturbance or breach of peace that might occur on the conviction of Mr. Bhutto.

The Chairman of the PPP, Begum Nusrat Bhutto, denied any plan to organise a protest demonstration or resort to breach of the law in the event of Mr. Bhutto being convicted by the Court.[63] But she herself was put under house arrest for 15 days under an order issued by the Lahore district magistrate. The action followed a statement by her which was termed "provocative and likely to instigate certain political groups to street demonstrations and likely to disturb public peace".[64] The Punjab Government initiated proceedings against the daily *Musawaat* for having published Begum Bhutto's statement on the ground that "its contents tend directly or indirectly to bring into hatred and contempt the government established by law and to excite disaffection towards the said government". The notice requires *Musawaat* to show cause within three days "why Rs 30,000 should not be demanded as security". The declaration of another pro-PPP daily the *Hayat of* Lahore was annulled for its failure to deposit Rs 30,000 demanded as security for publishing objectionable photographs.

According to newspaper reports, the police had arrested several persons, mostly those belonging to the PPP, from all over Punjab, Earlier reports spoke of several hundred persons arrested in Punjab, Sindh and N.W.F.P.

There were some curious aspects of the incident on March 9 in which pistol shots were fired outside the bungalows of three of the five judges of the Lahore High Court hearing the murder trial against Mr. Bhutto. The judges were Mr. Justice Zakiuddin Pal, Mr. Justice Aftab Husain and Mr. Justice Gulabaz Khan.[65]

Meanwhile, *Jasarat* disclosed in an editorial that Miss Benazir Bhutto, during her recent tour of Sindh, told PPP's active supporters to "act without waiting for instructions if anything happened to Mr. Bhutto. The preparations are complete

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[62] The Illustrated Weekly of India, April 30, 1978.
[63] The Times of India, March 11, 1978.
[64] Ibid, March 14, 1978.
[65] Ibid

and they are only waiting for the court's judgment".[66]

According to a spokesman of *Jamaat Island,* published from Karachi, the communist labour leaders were making secret plans to create anarchy in the country after the possible conviction of Mr. Bhutto in the Nawab Mohammed Ahmad Khan murder case. A delegation of these leaders went to Karachi and held underground meetings with labour and political leaders as well as with their friends in the bureaucracy. They drew up plans for large-scale subversion, strikes and violence. Their activities, however, were intended countrywide. They were bribing professional labour-leaders in industrial centers and forming united fronts of their paid organizations in educational institutions. Where they did not have any pressure groups among peasants and workers, they were inciting communal passions and trying to create artificial scarcity of *atta* and other essential articles. They had a hand in the recent subversive incidents in Sindh also.[67]

The authorities were fully prepared to meet the situation whatever turn it took.[68] Even when delivering the judgment the Chief Justice adopted a most unusual posture. The judgment was reserved, but, in all such cases, the parties had to be informed well in time so that they should be present when it is delivered. This did not happen.[69]

The judgment was unexpectedly announced by the Court at 8.20 a.m. on March 18, 1978. Special security arrangements were made and strong contingents of police posted around the precincts of the High Court. At 7.45 a.m. telephone calls were made to the counsels in the case to present themselves before the Court. They rushed to the Court. Mr. Bhutto and the other accused were brought to the Court under tight and strict security measures. No one was allowed to enter the courtroom except the accused and their counsels. Even the corridors of the High Court were barred to journalists and public men. The identity of persons entering the precincts of the High Court was checked. Mr. Yahya Bakhtiar was not present and when he reached the court at the scheduled time his client had already been sentenced to death.

Mr. Bhutto remained perfectly calm and composed when the judgment was being read out. Mr. Zulfikar Ali Bhutto and the other four accused were sentenced to death by a unanimous judgment of a Full Bench of the Lahore High Court, presided over by Chief Justice Mushtaq.[70]

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66 *The Times of India,* March 14, 1978.
67 *The Times of India,* March 14, 1978.
68 *The Times of India,* March 14, 1978.
69 The Illustrated Weekly of Luria, April 30, 1978.
70 *Musawaat,* March 19, 1978.

The announcement of the judgment took not more than 15 minutes after which Mr. Bhutto and others came out of the court room. Mr. Bhutto looked depressed; he took out his handkerchief from his pocket, wiped his face and forehead and looked at the sky before getting into a blue car which took him back to the Lakhpat Jail.[71]

The court held all the accused guilty of the offence and termed Mr. Bhutto as the arch culprit and compulsive liar who was liable to deterrent punishment.

Although the proceedings were held in camera, it is learnt on good authority that Mr. Bhutto refused to receive a copy of the judgment given by the Court.

Each accused was, however furnished with a certified copy of the judgment and was informed that, he could file an appeal to the Supreme Court against the judgment within seven days from March 18.

The others who were sentenced to death were Mian Mohammad Abbas, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad. All of them held various positions in the Federal Security Force (FSF).

Giving a summary of the 405 page judgment, the Court said that all the offences with which the accused were charged had been proved, that the conspiracy to murder Ahmad Raza Khan Kasuri did not end with the death of Nawab Mohammad Ahmad Khan but had continued even thereafter.[72]

The sentences awarded to the five accused were as follows:

Mr. Bhutto: Guilty under Sections 120-B, 02, 301, 11, 307 and 109, Pakistan Penal Code, sentence of death; R.I. for five years; R.I. for seven years; fine of 25,000 or in default six months' R.I.

Mian Mohammad Abbas: Guilty under Section 120-B, 302, 109, 11 307 and 109 P.P.C. Sentence of death; R.I. five years; R.I. for seven years.

Arshad Iqbal and Rana lftikhar Ahmad: Guilty under the above section, sentenced to death plus seven years R.I. each.

The sentences of imprisonment under each head are concurrent and these, together with the sentence to be undergone in default, would be effective in case the sentence of death was commuted by the Executive.

71 *Pakistan Times,* March 19, 1978.
72 *The Times of India,* March 19, 1978.

The Court devoted about six pages to the culpability of Mr. Bhutto in the murder and held that he had used the members of the FSF for personal vendetta and for satisfaction of an urge in him to avenge himself upon a person whom he considered his enemy. For his own personal end he had turned these persons into criminals and hired assassins and thus corrupted them. The Constitution did not grant immunity from law to anyone in the country, howsoever his rank or status might be nor did it declare anyone to be above the law and yet Mr. Bhutto had acted as if there was no law in the country relating to homicide or that he enjoyed complete immunity from law. His function was to eliminate law breaking tendencies but he had tried to inculcate in his subordinates such tendencies and used them for eliminating a person whom he considered his enemy. There was no rule under which he could escape extreme penalty.

Regarding the conduct of Mr. Bhutto in Court the Judges were of the view that he had been hurling threats as well as insults on the Court and at times had been unruly, in addition, he had proved himself to be a compulsive liar. He was allowed thrice to dictate his statement directly to the typist and he dictated nine pages on January 25 more than 11 pages on January 28 and about 11 pages on February 7 without any interference by the Court. All the three statements were full of repetition of false and scurrilous allegations against the Court. Yet he came out with allegations that the statements were not fully recorded. Out of the five accused he was the only one who had been leveling all sorts of imaginary and false allegations against the Court.

Referring to Mr. Bhutto's allegations against the Bench, the judgment said, "Before the start of the trial, Mr. Bhutto challenged the constitution of the Court on the ground that by his appointment as CEC the Acting Chief Justice had ceased to hold the latter office. He also made allegations of bias against the Acting Chief Justice. The Supreme Court directed him to raise these questions in the High Court. He then submitted two petitions challenging the constitution of the High Court and showing apprehension that he would not get a fair trial in view of the allegation of bias against the Chief Justice. These petitions were dismissed *in limine* by the Full Bench of the High Court.

"Besides strongly refuting the allegations of bias it was pointed out in the order that the matter was being heard not by the Acting Chief Justice alone but by a larger bench of five Judges each of whom had to act independently and was under oath to act justly without fear or favour. The accused submitted two petitions for special leave to appeal against the order before the Supreme Court. He, however, withdrew the petition filed by him to challenge the Chief Justice. Thereafter, he submitted several incompetent petitions repeating the same allegations, despite the fact that the matter had attained finality. In some petitions there was a prayer for transfer of the case to some other Bench or to the Sessions Court. All these petitions were dismissed. It was repeated that the

apprehension of the principal accused was altogether unreasonable.

"In his last petition for transfer which was submitted on January 18, 1978 the accused repeated all the earlier allegations of bias and supplemented them with a number of scandalous, scurrilous and baseless allegations. He also took such objections to the Court's ruling of procedure adopted by it, which could be taken only before a Court of Appeal.

"Since the practice of this Court is to hear motion cases in petition chambers and the Bench trying the case was of the view that the petition was submitted only to scandalize the Court and to give publicity to these baseless allegations with a view to shaking public confidence in the Court, it was considered proper to hear this, transfer case in motion in chambers. The accused was called to the chamber to argue the matter since he had submitted the petition in person and not through a counsel. On entering the chamber the principal accused showed surprise that the matter was not being heard in Court and requested that it should be heard there. This made it obvious that he was more interested in publicizing his baseless and scandalous allegations in the petition and his arguments on it. He was informed that motion cases are generally heard by the court in chambers. The principal accused then submitted that his counsel would argue the case. He named Mr. D.M. Awan and Mr. Ehsan Qadir as his counsel. Both the counsels were, therefore, called. However, they had nothing substantial to say. After finishing his arguments Mr. Awan requested to be allowed to withdraw from the case. His request was not granted. He prayed that the accused might be given a chance to make submissions on merits. He was allowed to do so, although he had no such right. When his counsel had been given full hearing, he started making a political speech which was irrelevant. He was warned by the Court to be relevant. He finished his submissions by saying that if he was not allowed to say what he wanted to say, he would not address the Court any further. Petition for transfer was then dismissed.

"Later, Mr. D.M. Awan stated that his client had withdrawn the powers of Attorney of all his counsel and he did not want to defend the case. The Court directed Mr. Ehsan Qadir and Mr. Awan to conduct the defence at State expense. Mr. Qadir appeared before the Bench and requested to be relieved. Mr. Awan also had the same request on the ground that the accused had refused to give him any instructions. The Court was of the view that since the accused appeared bent upon starting the attempt to arrange for his defence at State expense, it relieved Mr. Awan and directed the accused to conduct the case himself. This was the only course open to the Court.

"When the first question was put to Mr. Bhutto in his examination under section 342 Cr.P.C. he stated he was boycotting the proceedings and would not offer any defence. He would make a statement only about the reasons why the

present case was fabricated against him from the Court. Applications making allegations against the Court had been disposed of and they were not relevant to the statement under section 342 Cr. P.C. If the accused considered it necessary to hear on the same tune, it must be only with the intention that his slanderous statement might receive publicity in open court, as well as in the press.

"Now, no court, much less a Superior Court, can allow a litigant to challenge before it, its fairness integrity and impartiality, or to scandalize it, and to go on repeating with impunity, scandalous and libelous attacks on judges which are calculated to lower the authority of the judges and to malign them. If this is allowed it would shake the public confidence in the administration of justice. The proceedings were therefore, directed to be held in camera."

Mr. Bhutto made a statement and was asked to sign it but he refused to do so. On his enquiry whether he could correct typographical or grammatical errors he was told to make any corrections so long as the substance of the statement was not changed. He wrote certain uncalled for and incorrect remarks that the statement might not have been complete, the Court observed. Thereafter, he sent an application from the jail that his Statement was not correctly and completely recorded. His application was dismissed since the statement had been typed on the dictation of the accused himself and the allegations in the petitions were absolutely false. Later, a few supporters of Mr. Bhutto demonstrated against the holding of the Court in camera and created disturbances outside the High Court. It was ordered that the proceedings of the trial would continue to be in camera.

During the course of the trial Mr. Bhutto made a long statement denying the charges and giving his own version. The following is the finding of the Court:[73]

"The Nawab Mohammad Ahmad Khan died as a result of the murderous attack by Arshad Iqbal and Rana lftikhar Ahmad, accused, made under the supervision of Ghulam Hussain near the Shah Jamal Shadman roundabout, Lahore, on the night between the 10th and 11th of November, 1974, with weapons of 7.62 mm. bore obtained by Ghulam Mustafa, confessing accused, from Amir Badsha Khan for that purpose under order of Mian Abbas, accused."

The Court also held that the conspiracy in the present case became complete as soon as Masood Mehmood agreed to and did convey the unlawful order of the principal accused to Mian Abbas. The next significant development of conspiracy was the order of the principal accused to Masood Mehmood to take care of Ahmad Raza Khan Kasuri on his visit to Quetta. Masood Mehmood gave

[73] *The Times of India,* March 19, 1978.

directions to M.R. Welch to get rid of Kasuri. This part of the statement of their corroboration forms the documentary evidence on record. Further, the incident at Islamabad also lent full support to the evidence of conspiracy.

It also held that the prosecution had held considerable evidence to prove the subsequent conduct of Mr. Bhutto and his evidence and the investigation of the case. The fact that the empties were not sealed initially, were not kept in *Malkhana* of the police station and were allowed to be substituted was proved beyond any shadow of doubt. This story proved the tampering with the evidence by Abdul Hamid Bajwa and Mian Abbas.

The court was of the view that the participation of Mian Abbas in the conspiracy and the role played by him in the execution was corroborated by direct testimony of two witnesses and other circumstantial evidence of motive as well as the conduct before and after the murder. There was sufficient corroboration of the testimony of each approver which not only tended to connect but did actually connect the two contending accused. Had there not been such a strong corroboration, the conviction could have been based on the evidence of these accomplices because insofar as the principal accused was concerned the motive was exclusively his. The involvement of Mian Abbas by Masood Mehmood and Ghulam Hussain who had no score to settle with him was evidence of his connection with the offence.

The counsel for Mian Abbas had pleaded for lesser punishment for him on the ground of sickness, old age and under a hard taskmaster. “This submission is not tenable. He is the person who supervised the entire operation, selected the assassins and supplied arms to them for the commission of the heinous offence. It would amount to miscarriage of justice if the normal sentence of death is not imposed upon him” said the judgment.

The five Judges made repeated references to the *Quran* and the traditions of the Prophet. Nevertheless, most *Ulema* are of the opinion that the trial was not conducted according to the *Shariat* nor was the judgment in consonance with the principles of Islamic jurisprudence.

Under *Shariat* law no one who has not committed the murder himself can be hanged. Even if the evidence is believed, Mr. Bhutto had ordered the murder of Ahmad Raza Kasuri, not of his father. He cannot, therefore, be held guilty of a murder which he never intended nor ordered. Also by *Shariat* law a man convicted of murder is given the right to pay *kullara* to the family of the deceased and be pardoned. That was produced from religious leaders of unimpeachable integrity by the Arab Governments to prove to General Zia that the entire proceedings against Mr. Bhutto, including the sentence of death passed against him, were against the established principles of the *Quran* and the

Sunna.[74]

Relatives and friends of Mr. Ahmad Raza Kasuri reached his bungalow at Model Town, Lahore to congratulate him. Leaders of a few political parties conveyed congratulations on telephone. Earthen pot lights were lightened on the grave of the deceased Nawab.

One tends to agree with the views expressed by *The Times* when it says editorially that 'A verdict of guilty was what the regime wanted. The court was deliberating under heavy pressure. In these circumstances if Mr. Bhutto was to be executed it would inevitably be seen not as a just punishment but the cold-blooded elimination for dangerous political opponent—ironically the very crime for which Mr. Bhutto has been convicted. The court, which has condemned him to death is not, and cannot be, under the Martial Law, a body of manifest and unarguable impartiality.'[75]

"It was disclosed by Mr. Z.A. Bhutto during a meeting held with his wife in jail, that his last wish was '*my body be buried in Lahore. Lahore is the Stalingrad of Pakistan. Lahore is the pride of Pakistan. My grave must be established in Lahore only. Sindh is my body, Punjab is my soul, Baluchistan is my honour and NWFP my courage*'.[76]"

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[74] The Illustrated Weekly of India, April, 30, 1978.
[75] *Times of India,* March 23, 1978.
[76] *Dharam Yug,* May 7, 1978.

Reactions and Clemency Appeals

Sympathy is a supporting atmosphere,
and in it we unfold easily and well.

Emerson

As soon as the High Court Judgment was announced over the Radio, hell seemed to break lose in Pakistan. People were stunned and shocked. There was a tremendous display of emotion and sentiment. Two villagers in Lahore went to the extent of offering their sons to be hanged in lieu of Mr. Bhutto. Sentiment and emotion also gave vent to anger and violence. Students, women, workers, journalists, in fact people from almost all walks of life brought the country to a virtual stand still, as demonstrations, *hartals* and riots broke out. Hundreds courted arrest, some died in the clashes that resulted. Silent demonstrations of grief on the one hand, and senseless violence on the other, were resorted to, to bring home to the ruling authorities the strong opposition to the High Court verdict.

No one can dispute that the dispensation of justice and punishment of crime according to the laws of the land is an internal matter in which no other country should interfere. But in the civilized society of today it does not mean that incidents of cruelty, injustice, oppression and violence should go unquestioned as matters solely the concern of the country in which they take place.

As soon as the Lahore High Court gave its verdict, there began tremendous international pressure on Pakistan's Chief Martial Administrator, General Zia-ul-Haq and Chowdhry Fazal Elahi, to save the life of the former Prime Minister, Mr. Z. A. Bhutto. Foreign appeals were not uncalled for since they were in context of Article 45 of the Pakistan Constitution which empowered the President "to grant pardon, reprieve and respite and to remit, suspend or commute any sentence passed by any court, tribunal or other authority."

According to a *Jamahirya* news agency dispatch from Tripoli, the Libyan leader, Mr. Moammar Gaddafi, sent a telegram to General Zia asking that Mr. Bhutto should not be executed. He said the death sentence on Mr. Bhutto was politically and socially impermissible. It also praised Mr. Bhutto's "courageous role" following the secession of East Pakistan. For the Muslim world "Mr. Bhutto is still the chairman of the Islamic Summit Conference". The telegram concluded by asking Gen. Zia "to intervene personally to save the life of brother Bhutto".

The Turkish Prime Minister, Mr. Bulent Ecevit, asked for a reprieve for Mr. Bhutto.[77]

The Libyan Vice-President, Mr. Abdul Salam Jallound, during his visit to Pakistan, was reported to have told Pakistan's military *junta* that Libya was prepared to give economic aid to Pakistan only on the condition that Mr. Z. A. Bhutto would be granted clemency. The condition was apparently not acceptable to the present Government.[78]

The United Arab Emirates President, Sheikh Zaid-bin-Sultan Al-Nahayan, appealed to commute the death sentence. In a message to Gen. Zia, Sheikh Zaid said he was making the appeal in view of the brotherly relations between the UAE and Pakistan and in appreciation of the great services rendered by Mr. Bhutto for Islamic and Arab causes. He said he was confident that Gen. Zia believed in mercy and pardon.

The Pakistani Associations of Singapore appealed to Mr. Fazal Elahi Chowdhry to pardon Mr. Bhutto.[79]

Dr. Mohammad Mehdi, President of the American-Arab Relations Committee, in a telegram appealed to commute the death sentence because "it will not be in the interest of Pakistan, domestically or worldwide". Dr. Mehdi and Mr. Bhutto were classmates at the University of California at Berkeley during 1949-1952. The committee heads sought to promote friendship between the U.S.A. and the Arab nations.[80]

The Sudanese President, Mr. Gaafar Nim Giri's request to pardon Mr. Bhutto, was conveyed to the Pakistan Ambassador in Khartoum by the Sudanese Vice-President and Foreign 1Vlinister, Mr. El-Rasheed El-Tahir Bakar.

The Syrian President, Mr. Hafez Assad urged Pakistan to spare Mr. Bhutto from execution. The mercy plea was made in a message and was handed to the Pakistani Ambassador, Mr. Sarfraz Khan. Syrian President Hafiz Al Assad and Libyan President Gaddafi were reported to have had a special meeting with Gen. Zia-ul-Haq during his recent visit to Algeria and made a fresh plea to spare the life of Mr. Bhutto.

Other Arab rulers also expressed their concern over Mr. Bhutto's death

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77 *Times of India,* March 22, 1978, quoting AFP from London.
78 *Weekly Prabhat,* August 11, 1978.
79 Ibid March 21.
80 *Weekly Prabhat,* March 23, 1978.

sentences.[81]

The House of Commons of the United Kingdom unanimously approved a motion urging the Pakistan government to commute the death sentence of Mr. Bhutto.

Members of Parliament from all parties agreed in a voice vote to the motion presented by Mr. John Diefenbaker, former Conservative Prime Minister. The motion said Parliament "is moved by humanitarian concern". It said the Pakistan government should also "choose the option of mercy" for Mr. Bhutto's associates who were sentenced to death as well.[82]

A number of prominent British Members of Parliament and newspaper editors warned Pakistan's Chief Martial Law Administrator, that if Mr. Bhutto's appeal against his death sentence was denied and he was executed, "democracy may face a further and perhaps a fatal setback in troubled Pakistan".

The warning came in an open letter addressed to Gen. Zia and was published as an advertisement in the "Times" on behalf of the London committee for Press freedom and democratic government in Pakistan.[83]

President Anwar Sadat of Egypt asked General Zia-ul-Haq to intervene personally to commute the death sentence on Mr. Bhutto. It was because they were friends that he had "permitted" himself to make the request.[84]

The Indonesian Vice-President, Dr. Adam Malik, said that he had appealed to Mr. Fazal Elahi Chowdhry to spare the life of deposed Prime Minister, Mr. Bhutto. Mr. Malik, who was Indonesian's Foreign Minister for 11 years, said he personally did not believe in capital punishment.[85]

U.N. Secretary-General Kurt Waldheim in a message to the Gen. Zia-ul-Haq urged him to reconsider the award of death sentence to Mr. Bhutto and not to carry it out."[86]

Amnesty International, called upon the Pakistan Government to commute the death sentence "on humanitarian grounds", regardless of the outcome of any appeal.

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81 *Weekly Mustagbil,* January 6, 1979.
82 *Weekly Mustagbil,* January 6, 1979.
83 *Times of India,* April 23, 1978.
84 *Times of India,* March 23, 1978.
85 *Times of India,* March 27, 1978.
86 *Musawaat,* March 22, 1978, quoting BBC.

Mr. Yasser Arafat, Chief of the Palestine Liberation Organization appealed to Gen. Zia-ul-Haq in the name of "friendship and brotherhood between the people of Pakistan and Palestine" that the death sentence on Mr. Bhutto be withdrawn. President Julius Nyerere of Tanzania too made a similar appeal for sparing Mr. Bhutto's life.[87]

Dr. Alimur Raazi and Mr. Serajul Haq, political leaders of Bangladesh, also solicited withdrawal of death sentence against Mr. Bhutto.

The President of the Czechoslovak Republic, Dr. Gustav Husak, sent a message to Fazal Elahi Chowdhry asking for grant of clemency to Mr. Z. A. Bhutto. The message, delivered at Islamabad, said the gesture would be received by the Czechoslovak President, Government and people with gratitude as an expression of State and human wisdom. The message said the traditionally good relations and spirit of friendship between the two peoples had promoted the Czechoslovak President to convey his anxiety over the developments in Pakistan.[88]

Iran also joined the nations seeking clemency appeals when it put considerable pressure on Pakistan's military leaders for waiving death sentence on Mr. Bhutto.[89]

The BBC correspondent in Tehran, Andrew Whitely, said the Iranian Prime Minister, Mr. Amouzzegdar, has told western correspondents that Iran is threatening to stop its financial aid to Pakistan if the death sentence on Mr. Bhutto is carried out. Iranian aid estimated at between £200 million and £300 million a year "is a vital prop for Pakistan's faltering economic" said the BBC correspondent. He added that apart from straightforward cash help Iran had agreed to the postponing of early repayment of earlier large loan, but all this appeared to be in jeopardy if the Supreme Court upholds the death sentence on Mr. Bhutto.

The correspondent quoted diplomatic sources in Teheran as saying that Iran was also holding up a new request from Pakistan for more aid. The request was made by Gen. Zia-ul-Haq's Advisor on foreign affairs, Mr. Agha Shahi, during his visit to Iran.[90]

Mr. Brezhnev of the USSR, King Khaled of Saudi Arabia were reported to have appealed for commutation of death sentence to Bhutto. China, Australia,

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[87] *Musawaat,* March 22, 1978, quoting BBC.
[88] *Dawn,* May 24, 1978.
[89] *Times of India,* May 21, 1978.
[90] *The Times of India,* May 21, 1978.

Libya, Kuwait, and Qatar renewed their appeals.

On April 10, 1978, the Pak Foreign Office denied reports that a clemency appeal for Bhutto had been received from King Khaled of Saudi Arabia. At Islamabad on April 19, 1978 back from his three-day official visit to Saudi Arabia, the Chief Martial Law Administrator, Gen. Zia-ul-Haq, said in a Press Conference, when asked whether he had discussed Mr. Bhutto's future with the Saudi leaders, "It was too minor a problem. There were much more important points, and I didn't go to Saudi Arabia to discuss Mr. Bhutto's fate". When asked further whether the Saudi leaders, had made any comment on Mr. Bhutto, he said, "We discussed all possibilities, all matters….internal and of mutual, bilateral concern".[91]

The Australian opposition Labour Party leader, Mr. W.G. Hayden during his visit to Pakistan said that he had taken up the issue of the death sentence against the former Pakistan Premier, Mr. Z. A. Bhutto, in talks with the Pakistan Martial Law Administrator, Gen. Zia-u1Haq. Gen. Zia apparently told him that the Bhutto case was *subjudice* and would be decided in accordance with the legal process, and he had emphasised he could not intervene in a matter pending before the Supreme Court, the country's highest judicial body."[92]

The Indian Prime Minister Morarji Desai, however, declined to comment on the death sentence on Mr. Bhutto and said that it was an internal matter of Pakistan. But, Mr. Desai added, he would not hang former Indian Prime Minister Indira Gandhi if she was sentenced to death by a court. The Nepalese Prime Minister also referred to Mr. Bhutto's case as Pakistan's internal problem.

On his return from Iran, Mr. A. B. Vajpayee, Indian Foreign Affairs Minister said that Mr. Bhutto's case also came up during his talks with the Shah of Iran. He refused to divulge any details of the talks on this issue.[93]

An All India Committee was formed at New Delhi which appealed to democratic and progressive forces to join hands with the Committee to mobilize public opinion for restoration of civil liberties and democratic rights in Pakistan.[94]

The Chairman and other members of the Pakistan Shia Political Conference Lahore also appealed to Gen. Zia to repeal the death sentence on Mr. Bhutto.

Members of the Baluchistan High Court Bar Association sent an appeal to the

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[91] *The Times of India,* March 22, 1978.
[92] *The Times of India,* April 20, 1978.
[93] *Musawaat,* March 22, 1978.
[94] *Pakistan Times,* March 22, 1978.

President and the Chief Martial Law Administrator, requesting them to remit the death sentence of Mr. Bhutto. In a cable addressed to the Head of the State and the CMLA, they said, "In the name of Allah the Almighty please remit the death sentence of Mr. Zulfikar Ali Bhutto".[95]

In Bangladesh the Youth Wing of the National Awami Party (Bhashani) demonstrated outside the Pakistani Embassy and shouted slogans "We want release of Bhutto" and "establishment of the rule of law in Pakistan".

In Jammu and Kashmir a motion describing the death sentence on Mr. Z. A. Bhutto as "murder of democracy" was tabled in the assembly soon after reports reached that the Lahore High Court had awarded the capital punishment to the former Prime Minister of Pakistan.

Interrupting normal business, the Speaker, Malik Mohiuddin, read out the motion but reserved ruling on its admissibility. The sponsor of the motion, Mr. Bhim Singh (Cong.), however, was allowed to read in the House a *Samachar* report giving the news of the death sentence on the Pakistani leader.[96]

The Chief Minister, Sheikh Abdullah, gave an assurance in the State assembly that the sentiments of the people of Kashmir against the death sentence awarded to Mr. Zulfikar Ali Bhutto, would be conveyed to the Prime Minister, Mr. Morarji Desai, to urge the rulers of Pakistan to spare his life.

In a speech heard with rapt attention by the House, the Sheikh said that disregard for the democratic values and the absence of the rule of law in Pakistan had once again vindicated the decision of the people of Pakistan occupied Kashmir to cast their lot with India.

In 1947, National Congress leaders could foresee that democracy would go overboard in Pakistan and only India could ensure a democratic way of life. While in India, the rule of law had taken firm roots, the denial of democratic rights and the suppression of people's legitimate aspirations had become part and parcel of life in Pakistan.

The Sheikh mentioned the murder of Liaquat Ali Khan, Dr. Khan Sahib, Mr. Hayat Mohammad Khan Sherpo and several other leaders in support of his argument that all those who had opposed the ruling elite in Pakistan had come to grief.

Compared with this, in India there was no stuffing of opposition or dissent.

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[95] *The Times of India,* March 23, 1978.
[96] *The Times of India,* March 19, 1978.

Even the era of emergency had been followed by a peaceful transfer of power from one party to the other in accordance with democratic tradition all over the world.

The Sheikh said that what was happening in Pakistan did not please any one, least of all its neighbours. While the charges against Mr. Bhutto, were given wide publicity, all that had been said in his defence, was not made public because the trial was held in camera.

"All we can do is to pray to Allah to give wisdom to the rulers of Pakistan to run their country according to the rule of law".[97]

Mr. Mairaj Mohammed Khan, Convenor of the Qaumi Mahaze Azadi, in a statement issued at Karachi on March 28, severely criticized the demands for hanging Mr. Bhutto.

Such demands only expose the political bankruptcy and narrow-mindedness of the politicians. Mr. Mairaj demanded that all comments on Mr. Bhutto's death sentence should be banned under MLR 33, and said, "I cannot express happiness on the award of death sentence to even my worst enemy... only one person should not be made responsible for all the bad things that were done during the previous regime. The vital need of the hour is that Mr. Bhutto's case be left to the constitutional and legal processes."[98]

U.S. newspaper the *Washington Post* called on the Pakistan Government to have second thoughts about executing Mr. Bhutto.[99]

The New York Times said that to allow the execution to take place would in all likelihood so divide Pakistan that early elections and a return to civilian rule would be impossible.[100]

The *Guardian,* in an editorial commented that "the Court, which has condemned him to death, is not, and cannot be under Martial Law a body of manifest and unarguable impartiality. Hanging him now will inevitably make Mr. Bhutto a martyr. It will bring virulent and possibly uncontrollable civil strife".[101]

The Times newspaper said "in these circumstances, if Mr. Bhutto were to be executed it would inevitably be seen not as a just punishment but the cold-blooded elimination of a dangerous political opponent—ironically the very

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[97] *The Times of India,* March 23, 1978.
[98] *Masawaat,* March 29, 1978.
[99] *Imroz,* March 30, 1978.
[100] *The Times of India,* March 23, 1978.
[101] *The Times of India,* March 23, 1978.

crime of which Mr. Bhutto has been convicted".[102]

Clemency appeals came in for severe criticism from some factions in Pakistan. Among those who criticized the clemency appeals included Maulana Mufti Mehmood, PNA Chief; Maulana Tufail Mohammad, the Amir of Jamaat-i-Islami; Begum Nasim Wali Khan; Mr. Musheer Ahmed Pesh Imam, Member of Pakistan Bar Council and Secretary-General; International Law Association (Pakistan Branch); Mr. Justice (Retd.) B. Z. Kaikans; Ch. Zahur Ilahi, *etc.*

Urdu dailies *Jang* and *Jasarat* also criticized these appeals from abroad.

102 *The Times of India,* March 21, 1978.

The Final Judgment

People say law but they mean wealth.

Emerson

The High Court while allowing seven days time for filing the appeal, relied on Articles 185 and 150 of the Constitution of Pakistan read with the first schedule of the Limitation Act.

Article 185(2)(b) provides that "an appeal shall lie in the Supreme Court from any judgment, decree, final order or sentence of a High Court ... if the High Court has withdrawn for trial before itself any case from any court subordinate to it and has in such trial convicted the accused person and sentenced him ... to death, or to transportation of life, or imprisonment for life."

But Article 150 of the Constitution enjoins that "full faith and credit shall be given throughout Pakistan to public acts and records, and judicial proceedings of every Province".

Mr. Bhutto's first reaction was against an appeal which might possibly have something to do with the linking of his appeal to the Supreme Court with Article 150 of the Constitution by the High Court because he had boycotted the trial proceedings alleging the Chief Justice's bias against him and expressing his apprehension that he would not get justice from this Bench.[103]

The former Attorney General, Mr. Yahya Bakhtiar, met Mr. Bhutto in the Kot Lakhpat jail after the judgment. But Mr. Bhutto refused to give him the power of attorney for filing an appeal.

He was refused permission to meet Mr. Bhutto in jail the second time in the evening on the plea that the authorities had not "received orders from above". Mr. Bakhtiar complained that great impediments were being placed in his preparation for the appeal. Even his stenographer and typists had been prevented from going to the office. He had not been allowed a telephone connection. All this showed that the government did not like that an appeal be filed.[104]

Mr. Yahya Bakhtiar pressed Mr. Bhutto three times and at last the latter

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[103] *The Times of India,* March 21, 1978.
[104] *The Times of India*, March 21, 1978.

wrote the following letter to his defence lawyer:[105]

> "I am not closing my mind. The interest of the country is supreme. This is the third occasion on which you have pressed me very hard. I will give you my final answer after I am given the opportunity of meeting you again when my wife and daughter meet me. I did not kill that man. My God is aware of it. I am big enough to admit it if I had done it. I am a Muslim. A Muslim's faith is in the hands of God Almighty.
>
> "I can face him with a clear conscience and tell him that I rebuilt his Islamic State of Pakistan from ashes into a respectable nation."

An appeal on behalf of Mian Mohammad Abbas, former operations director of the Federal Security Force (FSF) was filed on March 22. The other three junior officers of the erstwhile FSF, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad filed a joint appeal.

Mr. Bhutto appealed on March 25 to fight the last legal battle in the Supreme Court. A 30-page appeal against conviction and sentence was filed with the Supreme Court by his lawyers. The appeal said bias and prejudice by the Court forced Mr. Bhutto to boycott the hearing and that no defence statements were read in open Court.

Gen. Zia, the appeal alleged, prejudiced the case by referring to Mr. Bhutto as being guilty of murder after his arrest in September. It also said a ballistic report demolished the prosecution case.

His chief defence counsel, Yahya Bakhtiar a former Attorney General, said further grounds of appeal will be filed later.[106]

> A separate application praying for removal of Mr. Bhutto from the condemned cell to better quarters was also filed by Bhutto's lawyers.[107]

On September 20, 1977, the Supreme Court under Chief Justice Yakub Ali, agreed to hear Bhutto's petition challenging detention under Martial Law. But on September 1977 Gen. Zia had forced him to retire.

Mr. Justice S. Awar-ul-Haq, a senior Judge of the Supreme Court was sworn in as Chief Justice of Pakistan by President Fazal Elahi Chowdhry at Rawalpindi on September 23, 1977.[108]

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105 *The Times of India,* March 23, 1978.
106 *The Times of India,* March 26, 1978.
107 *The Times of India,* March 26, 1978.
108 *Pakistan Tines,* September, 24, 1978.

The President also administered the oath to Mr. Justice Mohamad Afzal Cheema, Mr. Justice Mohammad Akram, Mr. Justice Dorab Patel, Mr. Justice Qaiser Khan, Mr. Justice Mohammad Haleem as Judges and Mr. Justice Wahid-ud-Din Ahmad and Mr. Justice Nasini Shah as *ad hoc* Judges of the Court.

The Chief Justice and the Judges were administered the new oath of office as prescribed by the President's Post-Proclamation Order No. 1 of 1977.

The Supreme Court comprising Chief Justice Mr. Anwar-ul-Haq, and above quoted Judges fixed April, 1, 1978 to hear the appeal filed by Mr. Bhutto as well as his applications. The first application to be heard was the one wherein it was prayed that Mr. Bhutto be removed from the condemned cell pending disposal of his appeal.

In a "confidential" letter to the Chief Justice of Pakistan Mr. Bhutto pleaded that the Judge should withdraw from the hearing of his appeal on the following seven reasons reproduced by the *Guardian:*

(a) While the appeal was pending "you did not consider it indiscreet or embarrassing to accept Gen. Zia's offer to appoint you as acting President of Pakistan."
(b) Irreparable harm caused by the Chief Justice by merging the judiciary and the executive, even if temporarily.
(c) He had resented his being passed over during the last selection of a Chief Justice more than a year ago when Mr. Bhutto was in power.
(d) After initially refusing to take the oath of office, had agreed to do so on the orders of Gen. Zia.
(e) On his appointment, he "considered it appropriate to be *critical* of my administration, declaring Gen. Zia as a national saviour".
(f) While addressing the Bar Association in Karachi last year "you bitterly criticized my government and my party".
(g) He had been zealously "collaborating" with the Lahore High Court Chief Justice, Maulvi Mushtaq Hussain, who handed down the guilty verdict.

Mr. Bhutto also requested the Chief Justice to avoid the nomination of any judge to constitute the Full Bench of the Supreme Court for the hearing of the appeals, thus allowing all judges to conduct the hearing on their own.[109]

The Chief Justice confirmed receipt of this letter[110] and was reported to have agreed to consider it seriously. The Chief Justice said at Lahore on May 16, that he

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[109] *Pakistan Times*, May 15, 1978.
[110] *Pakistan Times*, May 15, 1978.

would deliver a written opinion.[111]

The proceedings started on May 20, 1978. Over 50 correspondents, including a large number of foreign newsmen, were allowed to witness the proceedings of the Court. The Amnesty International was said to have permitted to attend the hearing. A number of foreign missions, including their Heads, also notified their desire to be able to watch the proceedings.

On the opening day of the hearing, the Chief Justice overruled the objection that he should not sit on the bench to hear Mr. Bhutto's appeal. The Chief Justice also dismissed the plea that he should refrain from nominating judges for hearing the case, but decided that the appeal would be heard by all the nine Judges of the Court. Excerpts of the text of the Chief Justice's order on Mr. Bhutto's objection:[112]

"On receipt of this application, I requested the learned Attorney-General Pakistan, Mr. Harifuddin Pirzada, and the senior counsel for the appellant, Mr. Yahya Bakhtiar; to discuss the matter with me so that its various implications might be examined with their help, thus enabling me to reach the right decision. They were both good enough to meet me on 15th May, 1978, in my chamber.

Mr. Yahya Bakhtiar stated that although he had full confidence in me, yet Mr. Bhutto felt otherwise for the reasons stated by him in his application, and as Mr. Bhutto's lawyer he was, therefore, bound to support the application.

"The learned Attorney-General felt that the application was malicious, *malafide,* without any substance on merits and had been made only as a device to create confusion and chaos, as similar objections could subsequently be raised against other judges of the Supreme Court, thus stultifying the working of the Court. Mr. Pirzada also stated that the application was, in any case, highly related as during the period of nearly eight months that I had been the Chief Justice of Pakistan, I had already dealt with several matters involving Mr. Bhutto and yet, at no stage was any indication given by Mr. Bhutto or his lawyers that they did not have full confidence in my impartiality and integrity.

"While controverting the various points raised by the learned Attorney-General Mr. Yahya Bakhtiar requested for time to seek instructions from his client in the light of the aforesaid discussion and particularly on the point whether any assurance could be given that similar objections will not be raised against the remaining judges of the Supreme Court, as mentioned above, during the course of the appeal.

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111 *The Times of India,* May 18, 1978.
112 *Sun,* March 21, 1978.

"Accordingly, both the gentlemen met me again on May 16, 1978, and Mr. Yahya Bakhtiar stated that at present there was no intention on the part of appellant to object to the presence of any other Judge on the bench. However, I got the impression that this statement could not be constructed as being in the nature of an assurance.

"In this application Mr. Zulfikar Ali Bhutto has made a two-fold prayer:

"(A) That I should not sit on the Bench of the Supreme Court of Pakistan which is to commence the hearing of his appeal from 20th of May 1978; and

"(B) That I should not select judges for that purpose, but let the full court, including the *ad hoc* judges, hear the appeal, as was done by the court in hearing Begum Nusrat Bhutto's petition, challenging the validity of the imposition of Martial Law.

"In support of these two prayers, he has listed the following reasons:

"(I) That I resented the constitution's sixth amendment, made by the Parliament under the appellant's leadership of the House, whereby my predecessor got an extension in the term of his office, and my promotion to the office of Chief Justice of Pakistan got consequently delayed;

"(II) That in the judgment of the Court in Begum Nusrat Bhutto's case, while holding that the 1973 Constitution is still the Supreme Law of the land, I have given arbitrary powers to General Zia-ul-Haq to rule the country for an indefinite period, including the power to amend the Constitution, which I found necessary to do, as he had nullified the Sixth Amendment to pave the way for my appointment as Chief Justice;

"(III) That, before my appointment as Chief Justice, the Judges of the Supreme Court had declined to take the oath as prescribed by the Chief Martial Law Administrator, but on my assumption of office, all the judges immediately agreed to take the new oath ordered by the General;

"(IV) That I have been critical of his administration for making amendments in the constitution, thus showing my deep resentment against him, as evidenced by my present office on the occasion of the Jurists Conference held in Lahore in December, 1977 and while addressing the District and High Court Bar Associations of Karachi on 23rd and 24th of January 1978.

"(V) That I and Mr. Justice Mushtaq Hussain, the Chief Justice of the Lahore High Court, have been close friends for many years, and both are zealously collaborating with the Martial Law Regime; and

"(VI) That while his appeal was pending before the Supreme Court, I did not consider it indiscreet or embarrassing to accept General Zia-ul-Haq's offer to appoint me as the Acting President of Pakistan, thus actively identifying myself fully with the executive, and merging, albeit temporarily, the executive and the judicial organs of the State.

"It is not appropriate that a judge should enter into a controversy with a party to a case pending before the court, but it is nevertheless necessary that misleading and incorrect statements and misconceived objections should be corrected, so that the whole matter can be seen in its proper perspective. 1 will, accordingly, briefly deal with each of the points raised by the appellant.

"(I) It is indeed true that by the Sixth Amendment to the constitution, the term of office of my predecessor was sought to be extended by nearly four years, but there was no occasion for me to resent the same. As I was informed, soon after the passing of the Amendment, by no less a person than the then Attorney-General for Pakistan, Mr. Yahya Bakhtiar, who is now the senior counsel for Mr. Bhutto; that this Amendment was not directed against me in any manner, and that, in fact, I would also get a similar extension under it, when I am appointed to succeed Mr. Justice Yaqub Ali Khan as the Chief Justice of Pakistan. On all possible occasions, Mr. Bhutto and his Attorney-General let it be known that being the senior most judge of the Supreme Court, I was to be its next Chief Justice and would be able to serve up to the age of nearly 69 years as against the prescribed superannuation age of 65 years, applicable in the case of associate judges of the Supreme Court.

It is, therefore, a misconception on the part of the appellant to say that I resented the Sixth Amendment. On the contrary, I willingly continued to serve under my predecessor, who was my senior, both in age and service, as a judge.

"II (A) Mr Bhutto has himself stated in the application under consideration, that Begum Nusrat Bhutto's case, challenging the validity of Martial Law, was heard by the full court. It is, therefore, a deliberately misleading statement to assert that in that case I have personally given certain powers to General Zia-ul-Haq. That was a unanimous judgment of the full court, delivered after hearing lengthy arguments from both sides, and setting forth detailed reasons for validating the imposition of Martial Law on the doctrine of necessity. It was, I believe, for the first time that a Chief Martial Law Administrator, in active control of the machinery of Government, was declared to be subject to the power of judicial review vesting in the superior courts of the country under the existing Constitution. In any case, if the appellant's inferences about

this judgment are to be accepted, then the whole court would stand disqualified from hearing the present appeals.

"(B) As to the repeal of the Sixth Amendment, I was informed by the learned Attorney-General, Mr. Sharifuddin Pirzada, in the presence of Mr. Yahya Bakhtiar, that in the draft accord under negotiation between Mr. Bhutto and the opposition leaders of the Pakistan. National Alliance, it was agreed that most of the Constitutional Amendments, including the Sixth, which had a bearing on the functioning and jurisdiction of the superior court, would be repealed before the holding of fresh elections. In these circumstances, it is a distortion of facts to suggest that General Zia-ul-Haq did me any favour by repealing the Sixth Amendment. Even Mr. Bhutto would have done the same in terms of the draft accord, if the situation had not taken a different turn.

"(III) I am not aware of any order made by the Chief Martial Law Administrator, before my appointment as Chief Justice in September, 1977, prescribing a new oath for the judges of the Supreme Court. There was, thus no occasion for the judges to decline to take any such oath, nor was there any need for me to persuade any of my colleagues to take the oath when it was prescribed. All of us felt that the new oath made no difference to the ability and obligation to do justice without fear or favour. In this behalf it would be instructive to reproduce here a passage from the judgment in Begum Nusrat Bhutto's case.

"Mr. Brohi, as well as Mr Sharifuddin Pirzada were also asked to address the court on the possible effect and implications of the new oath of office, administered to the judges of the Supreme Court and the High Courts after the imposition of Martial Law. They both stated that, in their view, the new oath has not in any manner restricted the independence of the superior judiciary, nor affected their obligation to perform their judicial functions according to law; it only indicates that the superior judiciary, like the rest of the country, has accepted the fact, which is even otherwise also evident, that on the 5th of July, 1977, a radical transformation took place in the pre-existing legal order. Both the learned counsel are agreed, that the taking of the fresh oath by the judges of this court does not, in any way, preclude them from examining the question of the validity of the new legal order and deciding the same in accordance with their conscience and the law.

"This is, therefore, a meaningless objection, having no relevance to the question of my capacity to hear the present appeal.

"(IV) It is correct that in the speeches referred to the appellant, I was critical of the constitutional amendments made by the Bhutto administration, as they had the effect of encroaching upon the powers.

"(A) The Amendments were widely condemned by legal and political circles throughout Pakistan even at the time they were made. It was for this reason that in the draft accord with the PNA leaders, Mr. Bhutto was obliged to agree to repeal them.

"(B) My remarks were made generally in response to addresses and speeches made on these occasions by the elected leaders of the associations, who pointedly referred to these amendments while expressing satisfaction on my appointment as Chief Justice; and

"(C) Criticism of these constitutional amendments cannot be regarded by a reasonable mind as amounting to personal bias against the appellant in a criminal case involving his life and liberty.

"(V) (A) I am surprised that my supposed friendship with the learned Chief Justice of the Lahore Court should be a cause for any apprehension in the appellant's mind. I have been in the judiciary for more than twenty-one years, and it is a matter of great satisfaction for me that most of the senior judges in Pakistan are my personal friends, bound by fraternal ties of shared values and ideals, but this personal regard has never prevented me from doing my duty as an appellate judge. Mr. Justice Mushtaq Hussain is no exception. It would be a great tragedy, indeed, if the work of an appellate judge should necessarily require him to severe all bounds of association and regard with judges of the courts from whose judgments he has to hear appeals.

"(B) The remark that Mr. Justice Mushtaq Hussain and I are both zealously collaborating with Martial Law is not only uncalled for, but mischievous, apparently intended to malign both the Courts over which we have the honour to preside. The judiciary in Pakistan has always endeavored to perform its functions according to its conscience and the law, and the present times are not an exception.

"In any case, the present appeal before the Supreme Court has arisen under the ordinary criminal law of the land, out of a case registered by a private citizen. It is highly tendentious and misconceived to make a baseless insinuation implying that the judges of the High Court and the Supreme Court will be influenced by their respective Chief Justices and the Martial Law authorities to deviate from the path of justice and rectitude.

"(VI) (A) Finally, Mr. Bhutto has chosen to take objection to my having acted as President of Pakistan, during the absence of the President who went for medical check-up for about two weeks. He seems to think that this was also a favour done to me by General Zia-ul-Haq. On the contrary, the true position is

otherwise. The President needed to go abroad, but was facing a difficulty owing to the fact that the Chief of the Senate and the Speaker of the National Assembly, who could have acted as President under Article 49 of the Constitution, were not in position. I was, therefore, approached as being next in the warrant of precedence, and I agreed, as it was indeed a case of necessity. As the appellant well knows, the president is only a Constitutional Head of State.

"(B) In so agreeing, I was following the noble precedents of two distinguished Chief Justices of Pakistan, viz., Mr. Justice Sir Abdur Rashid, and Mr. Justice Mohammad Munir, both of whom acted as Governor General of Pakistan for varying periods during their tenures as Chief Justice of Pakistan.

"(C) It is incorrect to say that I combined in myself the offices of the President and Chief Justice during these two weeks, as on my express proposal the senior most Judge of the Supreme Court, viz., Mr. Justice Mohammad Akram was appointed as the Acting Chief Justice of Pakistan for the period and functioned as the effective head of the judiciary.

"(D) This arrangement was in contrast ordered by Mr. Bhutto when he appointed the Chief Justices of Sindh, Punjab and the NWFP as Acting Governors, for varying periods, but refused to appoint Acting Chief Justice for the respective High Courts, in spite of advice in this behalf by the then Chief Justice of Pakistan, thus compelling the same person to simultaneously function as the active head of the provincial executive and judiciary.

"It will thus be seen that the objections raised by Mr. Bhutto to my presiding over the bench, which is to hear his appeal, are either misconceived or incorrect. They have no substance in fact, and did not disclose any personal bias on my part, such as would disqualify me from hearing this case.

"I must also take note of the fact that after assuming the office of Chief Justice of Pakistan, I had occasion to deal with a number of matters involving this appellant, *viz.*, Begum Nusrat Bhutto's case, his several petitions for leave to appeal against the judgments of the Lahore High Court, ... and his miscellaneous applications touching this very appeal. In all these matters, no indication was given at any stage, by Mr. Bhutto or his counsel that they had no confidence in my capacity to do justice to him. He personally appeared before the court in the first-mentioned case, and was heard by us for several hours and had no cause for complaint. The present objections are therefore, indeed highly belated and the result of an afterthought as suggested by the learned Attorney-General.

"One other important aspect may also be mentioned. The appellant not only

wants me not to sit on this bench, but also wants me to refrain from nominating the judges for hearing this case. Under the Constitution and the Law regulating the practice of the Supreme Court, it is for me to personally preside over all important cases, and to nominate judges for hearing cases which come up before the Court. No person has the right to ask me to abdicate this responsibility nor has he the right to demand a bench of his own choice. This would be contrary to the well established norms regulating the functioning of the superior court of this country. Any objection, if raised, must be left to be decided according to my conscience and sense of duty in the light of all surrounding circumstances of the case, including any possible repercussions on the capacity of my other colleagues to continue on the Bench, if similar objections are raised against one of them as the appeal proceeds.

For all these reasons, I have decided to overrule the objections raised by the appellant, as they are altogether misconceived and ill-founded. I have been in public service for the last 39 years, out of which more than 21 years have been spent in the judiciary. I would act in this case according to the dictates of my conscience and the oath which I have taken, to do justice, without fear or favour, affection or ill-will.

"In view of the nature and importance of the present case, I have further decided that it shall be heard by the full court, comprising all the nine judges, including myself."

Opening his arguments in the case, Mr. Bhutto's counsel, Mr. Yahya Bakhtiar said, the case was false, fabricated and politically motivated. It was the result of an international conspiracy to forcibly eliminate Mr. Bhutto, politically and physically.

Mr. Yahya Bakhtiar submitted that the prosecution had failed to prove the charges that the record before the Supreme Court was not a faithful reproduction of what had transferred at the trial before the High Court. Even, on the basis of that record, however, the prosecution had failed to prove its case.

Mr. Bhutto, he said, had been tried by a thoroughly hostile and biased Bench so that he did not get a fair trial and had been compelled to boycott the proceedings after having made every effort, for over two months, to defend the case. The Bench had, however made it impossible for him to do so. Mr. Bakhtiar then dealt with the motive of the crime and submitted that Mr. Ahmad Raza Kasuri was a nobody in the politics of Pakistan and it was not necessary for the Prime Minister to eliminate him. More virulent attacks had been made on the Prime Minister in the National Assembly but Mr. Bhutto had not thought of getting his opponents murdered. He cited the example of Rao Khurshid Ali, who was granted a PPP ticket after five years of persistent attacks in the National Assembly against Mr.

Bhutto.[113]

On the question of conspiracy, the prosecution case was that it was hatched on or about June, 5, 1977 but the main witness, Masood Mehmood, had said that Mr. Bhutto had told him that Mian Abbas already knew about it and that the latter should be reminded which meant that the conspiracy was not hatched on or about June 5.

He submitted that Masood Mehmood was a planted witness to provide a link in the chain of events. He had made no contribution to the prosecution case. It was a role without a role. According to the prosecution story, Masood Mehmood had been threatened and intimidated into accepting the post of Director-General of the FSF only to carry messages from the Prime Minister to subordinate officers.

At this stage, Mr. Ijaz Hussain Batalvi, counsel for the prosecution, submitted that the counsel for the appellant was putting the cart before the horse. The proper procedure was that he should first read out the evidence and then give an interpretation of it. Instead, he was giving one interpretation after another without bothering to read out the evidence. It was in evidence, he said, that Mr. Bhutto had given the charter of duties to Mr. Masood Mehmood that had to be followed by the FSF. His charter included the harrassment of political opponents; break up of political meeting, *etc.*

Mr. Yahya Bakhtiar submitted that he would read the evidence, but before he did so he wished to give the Court a bird's eye view of the points that he would urge during the hearing of the appeal.

The special public prosecutor, Mr. Rahman, submitted that the conclusions being drawn by the counsel for the defence were not borne out by the record. As a matter of fact, he submitted, Mr. Yahya Bakhtiar had his eye on the media and was playing to the gallery. The BBC, he submitted, was putting out a special programme and Mr. Yahya Bakhtiar was providing them material. He urged the Court not to receive any plea till such time as the evidence was read.

The Court ruled that Mr. Bakhtiar should briefly indicate his position and then read the evidence. The assessment of the evidence would come up later. As a matter of fact, the Court was allowing this only because Mr. Bakhtiar had prepared his case in that fashion. Otherwise, the position was that the evidence should be read first.

Mr. Yahya Bakhtiar said he wished the Court to make a note of what he would be stating after a detailed examination of evidence.

[113] *Pakistan Times, May 21, 1978.*

He submitted that conspiracy essentially was a consensus of the mind of various persons. But the prosecution story was that here was an order from the top to get rid of Ahmad Raza Kasuri. This was not a conspiracy and a charge on that score was not sustainable.

He submitted that there were only two witnesses regarding the hatching of conspiracy namely, Mr. Masood Mehmood and Mr. Saeed Ahmad Khan. Both had been arrested on the day the *coup* took place and had been under detention since then. Firstly, they were unreliable witnesses and secondly, they had been in custody. Their evidence could not be depended upon. But even if that were done, no case of conspiracy was made out. Masood Mehmood, particularly was a dishonest, false witness. He had been in custody from where he wrote a 100-page letter to the CMLA and 10 days later he confessed to the crime. His letter to the CMLA was not allowed to be produced by the trial court for purpose of confrontation of the witness. Saeed Ahmad Khan has also written a 30-page letter to the CMLA making a clean breast of the alleged misdeeds.

The counsel requested that Mr. Bhutto be allowed to be present in Court while the appeal was heard to enable him to get on the-spot instructions. The Chief Justice observed that this could be considered later. For the present, the counsel should proceed with the case. Mr. Bhutto was in Rawalpindi and the Court had allowed the counsel the facility of obtaining instructions from him from the jail.

Rao Abdul Rashid, Inspector-General of Police at the time of the murder, accused the Martial Law Authorities of having persistently subjected him to pressure and offered inducements for tendering evidence against Mr. Bhutto. Rao Abdul Rashid in his affidavit before the Supreme Court of Pakistan denied the allegation that Mr. Bhutto had interfered with the investigation of the Nawab Mohammad Ahmad Khan's murder.

Rao Abdal Rashid added that Mr. Bhutto, on the contrary, had directed him to spare no efforts to investigate the crime and trace the culprits. The former Prime Minister had never shown any interest nor had he made any attempt to influence the course of investigations.

The affidavit is reported to have stated that when the crime took place the Inspector-General was accompanying the Prime Minister on a tour to Multan where he received a telephone call from the DIG, Lahore, informing him that Mr. Ahmad Raza Kasuri was not willing to register an FIR apprehending that he would not get justice. Rao Abdul Rashid said that he asked the DIG to reassure Mr. Raza Kasuri that the investigation of the crime would be totally honest and conducted fairly.

The affidavit stated that when Mr. Rashid spoke to the Prime Minister on the morning of November 12, 1974, the Prime Minister directed him to spare no effort to trace the culprits and thereafter the Prime Minister never showed any interest in the matter.

Rao Abdul Rashid is also reported to have said in his affidavit that the Martial Law authorities had been trying to pressurize him to render evidence to the effect that the former Prime Minister had directed him to rig the elections.[114]

Mr. Mohammad Hanif Ramay, Chief Minister of Punjab at the time of the murder, issued a statement which assumed a new interest. Excerpts of it are:[115]

"The fact of the matter is that I wanted to appear in the murder case of Nawab Mohammad Ahmad Khan as a court witness and not as a prosecution witness. But the choice was not mine. So I made myself available in the court for three days, *i.e.,* December 7, 1977 onwards. I kept sitting in the registrar's office for full working hours on those days. Mr. M. A. Rahman (prosecution counsel) contacted me there and desired me to make a certain statement. I told him that I would only speak the truth.

"After three long days of waiting in the court premises I was finally told that my presence was not required. Suddenly on January 23, 1978, I was declared as having been won over, after a pause of full one and a half months.

"I do not want to go into the details at this stage, as it may prejudice the case. If Mr. M.A. Rahman has chosen to cross all limits of professional ethics by showing his files to Press correspondents while the case is still to be decided. I, at least, would like to exercise some restraint. However, I have to assert that to say that I was won over by Mr. Bhutto when he was no longer in power was absolutely ridiculous, malicious and totally false. Why I was not won over when Mr. Bhutto wielded absolute power and I had to suffer long solitary confinement at his hands."

At this stage Mr. Bhutto was shifted by a helicopter from Lahore to Rawalpindi.[116]

Resuming his overnight submissions, Mr. Yahya Bakhtiar said, there were contradictions in the confessional statement of approver Ghulam Hussain as well as between his statement and those of the three co-accused who were said to have

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114 The Times of India, May 24, 1978. Hayat, May 22, 1978.
115 *The Times of India,* May 24, 1978.

116 *Pakistan Times,* May 18, 1978.

confessed. The prosecution had tried to improve upon the case from time to time, and even during the trial Mr. Bakhtiar said, and, citing an example added, that the theory of substitution of the crime empties had not been indicated at all whether in the interim challan or in the statements of witnesses recorded by the police or by the magistrate.

Subsequently, improvements had been made to support this new theory, but even this new theory of substitution was not definite as the prosecution itself had produced evidence to show that there were possibilities of substitution at four different times. Without considering the other three, he said, the trial Court has accepted only one theory without assigning any reasons therefore.

The ballistic expert report particularly destroyed the case of the prosecution that the guns belonging to Battalion No. 3 of the Federal Security Force had been used in the commission of the offence. All the guns with the battalion at the time of the offence were sent to the ballistic expert for matching them with the empties, but the expert had given a report in the negative, he said.

He also argued on the question of admissible evidence available to the accused being shut out and inadmissible evidence being used against him by the trial court.

Touching the evidence of Mr. Saeed Ahmad Khan, the counsel said, this was made with a view to proving corroboration for the evidence of Mr. Masood Mehmood. In an interview with the appellant, supposed to have taken place in the middle of 1974, Mr. Bhutto was said to have asked him if he knew Mr. Ahmad Raza Kasuri. On his reply that he did not know him personally, the appellant remarked to him that he should remind Mr. Masood Mehmood of it. On returning to his off .e, he conveyed the message to Mr. Masood Mehmood, who replied by saying `alright'. That is all the evidence that the prosecution has produced to corroborate the testimony of Mr. Masood Mehmood, the sole witness of the conspiracy on whose word the appellant has been condemned to death and without whose words he could not have been convicted. The trial Court has called Mr. Saeed Ahmad Khan as an independent witness but his evidence, besides being unnecessary, was false.

The counsel said the evidence of Mr. Saeed Ahmad Khan showed that Mr. Masood Mehmood was present in Rawalpindi. The appellant was in Rawalpindi when Mr. Saeed Ahmad Khan conveyed the message to Mr. Masood Mehmood. Why should Mr. Bhutto quite unnecessarily introduce Mr. Saeed Ahmad Khan into, what the special prosecutor called, a close circuit conspiracy, Mr. Bakhtiar asked, and wondered if he had done it only to oblige the future prosecutor with a witness to corroborate the false evidence of Mr. Masood Mehmood.

The evidence of Mr. Saeed Ahmad Khan also conflicted with the documents

he had produced in his support. In his evidence, he had tried to show that the appellant was keen that Mr. Ahmad Raza Kasuri should rejoin the PPP, but the documents he had produced that it was he who was pleading the cause of Mr. Kasuri. It was he who had again and again requested the appellant to grant audience to Mr. Ahmad Raza Kasuri. On one of such notes sent by Mr. Saeed Ahmad, the appellant had written, "He must be kept on the rails, he must repent and he may crawl before he meets me. He has been a dirty dog. He has called me a mad man. He has gone to the extent of accusing me of killing his father. He is a lick. He is ungrateful. Let him stew in his juice for some time".

Describing the prosecution story as quite contradictory, he said, according to the prosecution evidence, Rana lftikhar Ahmad and Arshad lqbal were posted by Ghulam Hussain (approver) at a distance of about 10 steps from each other within the roundabout at Shadman colony. They had waited for Mr. Ahmad Raza Kasuri's car to come. As the car arrived, one of them fired in the air as a signal to the other. If that was how it happened, the empties of the ammunition used should have been recovered in the vicinity of the two spots within the roundabout at a distance of about 10 steps. However, the prosecution's own story was that the empties were recovered not only from the two spots, two within the roundabout and the two far away outside the roundabout. The site plan also shows that empties were recovered from four spots far away from each other. This contradicted the prosecution story quite materially.

It was also noteworthy that the recovery of the crime empties was not proved before the trial court, he added, and submitted that there were two independent recovery witnesses but they were not produced to prove the recovery of empties before the trial Court. Only the investigating officer was produced in this behalf.

The subsequent conduct of the appellant was also taken into consideration by the trial court to prove his guilt. The Court had been very keen to see that the credit of not a single prosecution witness was shaken in cross-examination and had consistently disallowed any question which could impeach the veracity of a witness, he said.

Mr. Yahya Bakhtiar argued that the reference in the judgment to Islamic laws and injunctions was most improper and that the trial court had only shown its bias against Mr. Bhutto while holding that he was not a good Muslim and was, therefore, not fit for holding the office of the country's Prime Minister.

In making these observations, Mr. Bakhtiar said, the trial court had been influenced by Gen. Zia-ul-Haq's earlier statement that Mr. Bhutto was not a pious Muslim. That the Court had given a certificate of being a good Muslim to Gen. Zia, only showed its bias against Mr. Bhutto. There were many precedents to show that bias could be on religious or political grounds. In any case, if we

were to go by Islamic laws, Islam did not permit the condonation of a criminal if he turned approver, he added.

Mr. Bakhtiar then submitted that after the examination of Mr. Bhutto under Section 342, Cr. P.C. he had noted in the margin that all he had said was not on the record. On this question, the trial court had observed that Mr. Bhutto was a compulsive liar.[117]

This was not the expression of a person administering justice. These were very strong words and showed the venom that the court had against Mr. Bhutto. Mr. Bakhtiar said and added that the judicial capacity of the Judge was paralyzed because of the bias and prejudice he nursed. Once it was shown that the judge was biased, the entire proceedings were affected.

On being reminded by the Court that as many as five Judges were on the Bench trying Mr. Bhutto, the Counsel submitted that the bias of one Judge could "contaminate" the others.

While reading the statement of Mr. Ahmad Raza Kasuri made in the trial court, Mr. Yahya Bakhtiar referred to a statement said to have been made by him before Mr. Justice Shafi-ur-Rehman in which he did not accuse Mr. Bhutto directly of the offence and had said that his public condemnation by the Prime Minister, who was the repository of all political and government powers, could prompt a diehard, an overenthusiastic person or a trigger-happy individual in the Government or outside it to want to eliminate him from the scene.

Mr. D.M. Awan, another defence counsel, stated that when Mr. Ahmad Raza Kasuri was asked before the Shafiur Rehman Tribunal as to what he meant by `political reasons" behind the murder, he had not been categorical about blaming Mr. Bhutto and had said that it might have been engineered by the *Oadianis.*[118]

Mr. Yahya Bakhtiar read the testimony of Mr. Ahmad Raza Kasuri before the Trial Bench and, analyzing the character of the witness, submitted, that Mr. Kasuri was an opportunist without scruples. Assuming, for argument's sake, that Mr. Bhutto was the murderer of his father, the subsequent conduct of Mr. Raza Kasuri showed that he would go to the extent of selling the dead body of his father for his personal gains. The evidence of such a person was not worthy of any credit, he argued.

Mr. Kasuri, he said, had in turns, been threatening the appellant, pleasing him and cringing for an interview with him, or blackmailing him. He had rejoined the

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[117] *Pakistan Times,* May 24, 1978.
[118] *Hayat, May 24, 1978.*

PPP in April 1976, but he would not have done so if Mr. Bhutto had actually got his father killed in 1974.

Mr. Yahya Bakhtiar also read out extracts from the National Assembly proceedings on June 3, 1974, which Mr. Ahmad Raza Kasuri had referred to in the FIR and subsequently in his statement before the Court. Mr. Kasuri, he said, had not correctly quoted the appellant, and even the trial Court had reproduced only two sentences of the appellant's speech, which were completely out of context.

The appellant had never said that "I cannot tolerate you any further". What he had in fact said was "1 cannot tolerate your nuisance." Mr. Bakhtiar pointed out that these verbal altercations were an ordinary affair as far as debates in Parliament were concerned; even harsher words and virtual threats of murder had been used on the floor of the House. He drew the attention of the Supreme Court to the utterances of Mr. Kasuri himself, when he had threatened that heads of Government party-men would be chopped off.

The Supreme Court directed the special public prosecutor on May 24 to produce before the Court the entire police file with regard to the investigation of the case, culminating in the remarks that the culprits were untraceable in 1975, and the Federal Investigation Agency (FIA) file, leading to the trial of Mr. Z. A. Bhutto and four others in fir; Lahore High Court.

The Chief Justice, Mr. Anwar-ul-Haq, asked the senior judge, Mr. Justice Mohammad Akram, to make a preliminary examination of the two files and report to the Court.

The court disposed of other business on May 25 and resumed hearing on May 27.

The Chief Justice upheld that no admissible evidence shall be shut out of the court.

The advocate on record, Mr. M.A. Rehman informed that a photostat copy of the 100-page letter written by the former director general of the disbanded Federal Security Force to the Martial Law Authorities had been received. Mr. Yahya Bakhtiar, requested the court that it should be made available to the defence.[119]

The Chief Justice said: "We note your submission that Mr. Raza Kasuri did not hold Mr. Bhutto directly responsible for the firing, in his FIR recorded on November 11, 1974".

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119 *APP,* May 24, 1978.

The counsel submitted that the defence had asked for a copy of the statement of Mr. Ahmad Raza Kasuri which was given by the prosecution but it did not contain the above words. On this it applied to the trial court for obtaining the report of the Tribunal. A deputy Secretary of the Home Department, Mr. Taqi-ud-Din Pal, examined the record and told the counsel that this portion of the statement was not on record.

An application was then made to the Trial Bench for summoning Mr. Justice Shafi-ur-Rehman, but no order was passed by the Court on this.

The State counsel, Mr. Ijaz Hussain Batalvi submitted that the report of Mr. Justice Shafi-ur-Rehman was an expression of his opinion and under the Evidence Act it was not an admissible piece of evidence. The parties could not ignore the provisions of the Evidence Act even by mutual consent and agreement.

Intervening, the special public prosecutor, Mr. M.A. Rehman explained that a report of the Islamabad incident relating to the attack on the life of Mr. Ahmad Raza was lodged on August. 24, 1974—A statement of Mr. Kasuri was recorded by the Police. But Mr. Kasuri, denied having been contacted by the police or of having made a statement to any police official.

On January 6, 1975, Mr. Kasuri had appeared before Mr. Justice Shafi-ur-Rehman and also filed a written statement. In these statements he had accused Mr. Bhutto in no uncertain terms, of the murder of his father. He had stated that he did not expect any justice from the executive authorities since the Head of the Government was Mr. Z.A. Bhutto. Under the circumstances, Mr. Kasuri would not co-operate with the Tribunal till such time as Mr. Bhutto was in power. Subsequently, Mr. Asghar Khan, SP, and Mr. Warns, a DSP appeared before the Tribunal and tried to exonerate Mr. Bhutto. On this Mr. Kasuri filed another written statement before the Tribunal on February 2, 1975 again accusing, in categorical terms, Mr. Z.A. Bhutto of the murder of his father.

Winding up the preliminary statement of his case, Mr. Yahya Bakhtiar submitted that the Trial Court had not conducted the case properly. The defence was not allowed to confront a number of witnesses with their statements. The defence had also not been allowed to test the veracity of the main witness, Mr. Masood Mehmood, Mr. Bakhtiar said and pointed out that they had wished to question him on his relationship with a particular woman, which had a bearing on his antecedents and character, and the questions from the defence point of view were important to question the credibility of the witness. Moreover, certain passages in the statement of Mr. Abdul Wakil Khan, a police officer, had been incorporated at the instance of the Trial Bench in spite of the fact that the witness had not deposed them.

Mr. Yahya Bakhtiar also attacked the order of the Trial Court with regard to holding the proceedings in camera. Mr. Bhutto had said that he would make a statement regarding the *mala fides* of the present Government and why the case had been instituted against him. But the next day, the proceedings were held in camera. The Court explained that this was necessary since Mr. Bhutto was to attack the integrity and impartiality of the judges. The succeeding day the excuse was that there was likelihood of disturbances. It was stated that the proceedings would not be published. This order, however, was not respected by the Court itself. What the other accused said was given publicity but what Mr. Bhutto said was shut out. This proved the bias of the trial Bench.[120]

Referring to the testimony of former Federal Security Chief, Masood Mehmood, in the trial court, Mr. Yahya Bakhtiar, resuming his submission before the Supreme Court on May 27, stated that the witness was totally unreliable.

The witness was arrested on the day the military took over the administration of the country on July 5, and remained under detention since then. During the detention he made, what he called, a clean breast of the misdeeds of the Federal Security Force under the order of Mr. Z. A. Bhutto in a 100-page letter to the Chief Martial Law Administrator and in reply to a questionnaire given to him by the Martial Law Authorities, but no copy of the letter had been supplied to the defence.

He had stated in his evidence that he was called by Mr. Veqar Ahmad, the Secretary Establishment on April 12, 1974 and told that the Prime Minister was going to offer him an important post which he must accept in view of his personal and family circumstances. Mr. Masood Mehmood said he later met the Prime Minister who praised his integrity and capacity for hard work and told him that he was being appointed the Director-General of FSF.

Mr. Yahya Bakhtiar said according to Mr. Masood Mehmood, the latter was summoned by the Prime Minister a day or two after the Parliament session on June 3, 1974 and was told that Mr. Bhutto had already given directions through his predecessor, Mr. Haq Nawaz Tiwana, to Mian Mohammad Abbas to get rid of Mr Raza Kasuri. According to Mr. Masood Mehmood, he was shocked on hearing these orders and pleaded that the execution of these would be against his conscience and the dictates of God. On this, the approver said the Prime Minister lost his temper and said, "you don't want Vaqar to keep chasing you do you?

Mr. Yahya Bakhtiar said even if it were assumed that such an order were given to his predecessor, there was no need for Mr. Bhutto to remind Mian

[120] *Pakistan Times,* May 28, 1978.

Mohammad Abbas through Mr. Masood Mehmood, especially when the Prime Minister could speak to any of the subordinates of Mr. Masood Mehmood directly.

Secondly, the threat of Vaqar chasing him could not be sufficient compulsion for taking part in a murder. Therefore, the claim of the approver that he was forced to join the conspiracy was a complete lie, the defence counsel argued.

Commenting on the veracity of Mr. Masood Mehmood, Mr. Yahya Bakhtiar submitted that he was the person who would not admit that he had married the wife of the friend of his who had got a divorce from her previous husband.

Continuing his arguments, Mr. Yahya Bakhtiar said according to Mr. Masood Mehmood, the Prime Minister called him again after the November 11, 1974, incident and told him that the actual task had yet to be accomplished whereupon he told the Prime Minister that he would not carry out any orders any more. If the approver could categorically say "No" at this stage he could have said "No" at the earlier stage too.

Mr. Yahya Bakhtiar, said that there were numerous contradictions between the former FSF Chief, Mr. Masood Mehmood's statement before the Lahore High Court and his earlier statements, which showed how the prosecution had continued to improve its case before the High Court.[121]

Mr. Yahya Bakhtiar said the 100-page statement sent by Mr. Masood Mehmood to the Chief Martial Law Administrator was typed by Mr. Abdul Haq, one of the former Directors of the Federal Security Force. He submitted that it was his case that this officer served as a liaison between the witness and the military authorities.

The Counsel submitted that Mr. Masood Mehmood was not qualified to become an approver because he did not fulfill the conditions of pardon since he had not disclosed full facts either before the magistrate or before the Trial Court. In fact, the witness said he could not give the full facts even in the cross examination and thereby comply with the condition of pardon.

Reading from the evidence, the defence counsel submitted that the famous smuggler, Seth Abid was a paternal cousin and brother-in-law of Mr. Masood Mehmood and was a fugitive from law up to July 5 and his property had been confiscated. He had come back to Pakistan in September 1977 after Mr. Masood Mehmood's confessional statement.

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[121] *Pakislan Times,* May 29, 1978.

With regard to the alleged task being assigned to Mr. Masood Mehmood by the former Prime Minister and the former's refusal to carry it out any further Mr. Yahya Bakhtiar read out the following portion of the evidence of Mr. Masood Mehmood, "It is not to my knowledge that any attempt on the life of Mr. Ahmad Raza Kasuri was made after November 11, 1974 by the Federal Security Force because despite the orders of the Prime Minister to go for Mr. Ahmad Raza Kasuri, I had told Mr. Mohmood Abbas that this would not be done".

This evidence completely destroyed the case of the prosecution and the evidence of Mr. Masood Mehmood that he was under compulsion from the Prime Minister. According to this very statement Mr. Masood Mehmood had the full control not only over himself but also over Mian Mohmmad Abbas who was taking orders from him and no one else, Mr. Yahya Bakhtiar submitted.

Summing up his comments on the evidence of Mr. Masood Mehmood, former FSF Chief Mr. Yahya Bakhtiar, Mr. Bhutto's counsel, told the Supreme Court on May 30 that Mr. Masood was a "thoroughly unreliable, untruthful and dishonest person."[122]

"Be is a vital link smuggled in to involve Mr. Bhutto in a false case of conspiracy and on his words depends whether the former Prime Minister should live or die."

Mr. Yahya Bakhtiar again emphasised that according to his evidence, Mr. Masood Mehmood had no courage to say "no" to the then Prime Minister when the task was originally alleged to be assigned to him because at that time the considerations that prevailed on him were the welfare of his children and himself, and the repayment of the loans he had taken from the banks and Government, and the weakness of his *eeman* (faith). But after the Lahore incident, he had suddenly got back his *eeman.*

Referring to the double opportunity given by the Punjab High Court to Mr. Irshad Admad Qureshi, advocate appearing for the three confessing accused, Mr. Yahya Bakhtiar pointed out that after the examination in chief of Mr. Saeed Ahmad Khan, Mr. Irshad Ahmad Qureshi was given an opportunity to cross-examine the witness first on behalf of Arshad Iqbal and Rana lftikhar on November 16. In respect of this witness, however, the counsel adopted the earlier cross-examination for the third accused as well. Mr. Irshad Ahmad Qureshi, was, in fact, acting as co-prosecutor, he added.

Mr. Irshad Ahmad Qureshi took exception to these remarks, but Mr. Justice Wahesduddin observed that the record showed that he was supporting the

[122] *Pakistan Times,* May 31, 1978.

prosecution.

The Supreme Court directed the defence counsel, Mr. Yahya Bakhtiar, on May 31 to barely read the evidence and reserve his comments to be given with full arguments later for expenditious hearing of the appeal.[123]

The Pakistan Supreme Court on June 3, directed Mr. Sayeed Ahmad Khan, former chief security officer to Mr. Bhutto, to submit three documents for examination by it.

The documents were based on a letter and a statement sent to the Chief Martial Law Administrator by Mr. Sayeed Ahmad Khan.[124]

Mr. Yahya Bakhtiar read out the evidence of prosecution witness (Dr.) Asif Chaudhry who had treated the deceased. He submitted that the medical evidence would lend to show that the deceased had been fired at from his left side or from both sides but not from the right side alone as was the story given by the confessing accused and approver Ghulam Hussain and Mr. Ahmad Raza Kasuri. At this stage the Court rose for the day.

It was submitted before the Supreme Court on June 4 that he wanted prosecution witness M.R. Welch to come back to the witness stand. Reading the evidence of the Director of the former Federal Security Force in Quetta, the counsel submitted that the entire during the absence of evidence of the witness, including the cross examination, was recorded the accused.

The Court observed that the counsel might make a formal request and it would decide the procedure later.

Mr. Yahya Bakhtiar submitted that another aspect of the case which had come to the knowledge of the defence in subsequent research was that M.R. Welch was a Catholic Christian but before the Trial Court he had submitted that he was a Muslim to avoid taking any oath on the Bible.

The advocate on the record for the State pointed out that the witness had embraced Islam some time back. Mr. Yahya Bakhtiar submitted that the witness did become a Muslim to marry a second time as the Catholics could not marry twice, but he had been regularly attending Church. Mr. Yahya Bakhtiar also pointed out that Mr. Welch had admitted that he had been interrogated by the Martial Law team on July 18, 1977 and that he had made a statement before that team.

[123] *The Times of India,* June 1, 1978. *Pakistan Times,* June 1, 1978.
[124] *The Times of India,* June 4, 1978.

Mr. Bakhtiar stated that he could have requested the Court to summon the statement of Mr. Welch, which he had given in writing to the Martial Law team, but he had learnt from reliable sources that the 100-page statement of Mr. Masood Mehmood, which he had sent to the CMLA and which was summoned by the Supreme Court, had been tampered with and tailored according to the needs of the prosecution because Mr. Masood Mehmood was still in their custody and they could make him say or do whatever they wanted.

On June 14, the Court adjourned the hearing of the appeals to July 1. The two week adjournment was necessitated by the commitment of the Chief Justice to attend the Seventh Asian Judicial Conference being held in Jakarta.[125]

The Supreme Court resumed the hearing on July 1,[126] and heard the evidence of five more prosecution witnesses.[127]

Mr. A.K. Brohi, a senior advocate, filed a miscellaneous application on behalf of the Federation of the Pakistan in the Supreme Court challenging the Court's jurisdiction to take up Mr. Bhutto's petition against the detention of Mr. Z.A. Bhutto and 10 other PPP leaders, and requesting it to implead the Federation of Pakistan as a party in the matter of the said petition.[128]

Mian Mohammad Abbas, former Operations Director of the para-military Federal Security Force, said in a confession statement read out by his lawyer, "I now admit my role in the conspiracy of the murder of Mr. Ahmad Raza Kasuri.

"I was involved in the conspiracy to murder Mr. Ahmad Raza Kasuri on account of said threats extended to me by Mr. Masood Mehmood, who in compliance with the order of Mr. Bhutto had compelled me to become a privy to the said unholy scheme.

"In order to unburden my conscience, therefore, I take this opportunity to disclose the whole truth to save my soul from perpetual agony.[129]

Mr. Yahya Bakhtiar, requested the Chief Justice of the Supreme Court on July 30 to exercise his Constitutional powers and appoint Mr. Justice Qaiser Khan, who retired in July, as an *ad hoc* Judge to continue on the Bench.[130]

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125 *The Times of India,* June 11, 1978.

126 *The Times of India,* July 2, 1978.
127 *Pakistan Times,* July 2, 1978.
128 *Pakistan Times,* September 22, 1978.
129 *The Times of India,* July 11, 1978.
130 *The Times of India*, August 21, 1978,

The Chief Justice observed that in his view, the Constitution should have its normal course, which prescribed the age of 65 years for retirement of a Judge of the Supreme Court, and Mr. Justice Qaiser Khan had attained the age of retirement.

Mr. Bakhtiar completed his arguments on August 20, by taking 57 days.[131]

Mr. Yahya Bakhtiar submitted before the Supreme Court on August 6 that he had been subjected to harassment ever since the hearing of the appeal of his client against his conviction by the Lahore High Court had begun.[132] He had been under constant surveillance by the CID, with the result that his colleagues and people who wished to meet him were afraid to do so. He had kept quiet so far but the police had raided the five rooms occupied in the Flash-man's Hotel by the defence in the early hours of that morning and subjected them to an extensive search, without even a search warrant.

In an emotional voice, Mr. Yahya Bakhtiar said he knew he would be skinned alive, "after the hearing of the appeals is over", and he would not then seek assistance from Their Lordships.

He said the police had also arrested Mr. Ataurrahman, former secretary of Mr. Bhutto, who was now working with them.

The Supreme Court was adjourned[133] to September 16 with the Chief Justice, Anwar-ul-Haq's observation on August 21 that the judges had been hearing the same case for a long time and had forgone their summer vacation. Now it was being proposed that the court should go into recess for two weeks instead of 12 weeks.

The hearing was resumed on September 16 when the special public prosecutor, Mr. Ijaz Hussain Batalvi, made his submissions. In his opening address to the eight-member Supreme Court, the Counsel for the prosecution, Mr. Ijaz Hussain Batalvi, made an impassioned appeal to the Judges to appreciate the evidence and its plausibility in the light of the social liberties obtaining in Pakistan at the time of the murder of Nawab Mohammad Ahmad Khan, when the people had to pay for their integrity, the dissenting voices were brutally silenced by merciless murders and when insecurity was the order of the day.

The Counsel gave a graphic description of the atmosphere prevailing in Pakistan during Mr. Bhutto's role to point out that plausibility of a particular

[131] *Sun*, August 7, 1978.
[132] *Pakistan Times,* August 23, 1978.
[133] *Pakistan Times,* September 17, 1978.

statement was related to time and space. It was a social concept and had to be judged in the light of the liberties prevailing in a given society. Attacking the defence argument that the pieces of evidence were implausible, the counsel submitted, "If we look at the evidence closely, the myth of implausibility would appear most plausible in itself". He submitted that quite a few political persons were murdered because they belonged to a different shade of opinion. All voices of dissent were brutally silenced and all cases filed, untraced.

The defence plea that the question of touching a non-entity like Mr. Ahmad Raza Kasuri did not arise was of no avail because, perhaps, in the order of priority the name of other critics like Rao Khurshid Ali Khan did not figure high enough.

He lashed out at the appellant's plea that the witnesses were pressurized and efforts were made to fabricate the evidence because the Martial Law Authorities were at the back of the case and they wished to go at it, by hook or by crook. This plea had been repeated a number of times so that it was projected in the media of mass communication with a view to reaching the people. According to him, the case had certain facts which could not be controverted, which were stubborn, which were consistent and which stared one straight in the eye. How could anyone forget that the FIR was recorded on November 11, 1974 by the son of the deceased? It contained the name of Mr. Z. A. Bhutto. The author of the report within minutes of the death of his father placed the blame squarely at the door of Mr. Bhutto. Did Martial Law exist on November 11, 1974? He asked. How could then Martial Law be the author of this case?

The investigation in this case was clean and honest, he said and added that there were no pressures on the witnesses. Investigation commenced in the third week of July 1977. The clues and evidence had been previously destroyed and the culprit protected. One of the accused (Mian Abbas) was still in service till August 11, 1977. All the documents in the house of the Prime Minister had been removed by Mr. Z.A. Bhutto. In spite of all these difficulties, the interim challan was put in on September 11, 1977, and a complete challan on September 18, 1977. Thus, the investigation was completed within two months. If the investigation suffered from any flaws, it only showed that it was done as in the case of other criminal charges.

The counsel submitted that only one example would suffice to show that there was a total absence of pressure and coercion in the investigation of the case. This example was the report of the ballistic expert. The report was negative and if the witnesses could be pressurized, there was no difficulty in getting a positive report. The author of this report belonged to the technical wing of the FIA, the very agency which was conducting the investigation of the case. "If the mighty Martial Law was what Mr. Yahya Bakhiiar asserts it was then at least, of

all the persons, he should know that the result would have been different", he said.

The negative report of the ballistic expert spoke volumes for the fact that there was no pressure on anybody in this case. The negative report was immediately supplied to the defence.

Mr. Ijaz Hussain Batalvi, told the Supreme Court on September 17 that the extraordinary interest taken by the authorities to keep the Federal Security Force out of the investigation of the case of the murder of Nawab Mohammad Khan on the instructions of Mr. Z.A. Bhutto lent support to the fact that he had a hand in the offence and wished to shield the culprits lest they spoke out the truth.

Referring to the defence plea that Saeed Ahmad Khan had a role without a role in the case, he submitted that the appellant had contended on the one hand that Saeed Ahmad Khan did not know what message he was carrying and on the other he had taken the plea that he should not be believed because he was an accomplice. But if Saeed Ahmad Khan had no role to play, it did not lie in the mouth of the defence counsel to say that he was not an accomplice. The case of the prosecution was that Saeed Ahmad Khan did carry a message from Mr. Bhutto although he did not quite know what it was about. However, after the occurrence he had played a significant role in the events that followed.

His role had been to frustrate the judicial inquiry, to pressurize the witnesses and misdirect police investigation with a view to shielding the real culprits. In this role, he was acting as an agent of Mr. Bhutto.

The counsel submitted that the FSF and the officers of the Prime Minister were two separate forces and they never met except at the apex which was in the person of Mr. Bhutto. An arch has been constructed. On the one hand, was the Force which committed the crime and on the other was the one which shielded it; both of them met at the Prime Minister's level.

The effort to save the FSF was made only because if the real culprits had been apprehended, they would have told the truth and i at the end of the chain would have been found the chief executive of the country. Thus, Mr. Bhutto was not saving the FSF; he was saving his own skin.

Mr. Saeed Ahmad Khan and the Officer on Special Duty, Abdul Hameed Bajwa, were in Lahore in 1974, Saeed Ahmad Khan was meeting the officers concerned. He was summoning them to Rawalpindi and was constantly directing them on the lines on which the investigation should proceed, the counsel said.

He had detailed some of the police officers to go to Darra to find if the type of ammunition used in the commission of the offence was available there and written letters to the Defence Secretary asking for information regarding the army units which used this type of ammunition.

The counsel submitted that if it was only an innocent effort by an innocent person, why were steps taken to create a barrier against the FSF? Why the FSF was prohibited area for the investigators?

Justice Shafi-ur-Rehman had not named the FSF but had hinted that the murder had been undertaken by an organization. It was known that the murder had been undertaken by an organization. It was known that 7.62 mm calibre ammunition had been used in the commission of the offence. The office of the FSF was nearby the scene of occurrence. Yet the FSF was never included in the investigation and special efforts were made to keep it out of the fold of investigation.

Dealing with what he termed as the most painful part of the story, namely bias on the part of Chief Justice Mushtaq Hussain, he submitted that the allegation was nothing but a slanderous abuse from the very beginning of the trial. These allegations were made to make fun of the Trial Court, to ridicule it and to shake public confidence in the judiciary.

It had been said, he argued, that Justice Mushtaq Hussain suffered from a bias as he was superseded for the post of Chief Justice. Secondly, objection had been taken to the Judge acting as the Chief Election Commissioner. Other grounds relating to bias were added later. It was said that the Bench comprised five judges but the allegation of bias was against one judge and that had an influence on the others.

Mr. Yahya Bakhtiar had also made a statement that he had advised his client at the very outset that he should boycott the trial as no justice would be meted out to him. This prejudicial piece of advice had been given when the proceedings of the Trial Court had not even commenced. Who then was biased, the judge, the accused or his senior counsel?

On the advice of Mr. Yahya Bakhtiar, Mr. Bhutto had come to the Court with venom against Justice Mushtaq Hussain. The bias had emanated from the counsel, it was passed on to the accused and with his attitude the case went off the rails. Since Mr. Bhutto had animosity against Justice Mushtaq Hussain even the ordinary observations of the judge were misconstructed and misinterpreted.

Mr. Batalvi submitted that the allegation was that Mr. Justice Mushtaq

Hussain had been superseded for the post of the Chief Justice and that was why he suffered from a bias against the accused. The office of Chief Justice, under the law, is not available to any one as a matter of right based on seniority. Therefore, a judge cannot be superseded when he had no right to the office.

The moment a motive was ascribed to a judge, the law of contempt was attracted since that was the only way to strengthen and uphold the dignity of the institution. In this case efforts had been made to demolish the institution of the judiciary itself. The courts could not allow the accused to state that he should not be tried because the judge was biased.

Mr. Batalvi submitted that it had been maliciously asserted that the record of the court had been manipulated. This was a very serious charge against five senior judges of a court of record. A presumption of correctness was attached to judicial record and this presumption was available even to a third class magistrate. If such an allegation was allowed to be made against a court of record then we had to say goodbye to the practice of criminal law. All the judges of the Trial Court had taken an oath under the Constitution to perform their sacred duty of administration of justice fairly and an allegation of this type could not be allowed to be made.

An accused who had set up the Dulai Camp for illegal detention of people, who had appointed men like Sayeed Ahmad Khan and Masood Mehmood to senior positions for dirty work and who had been charged for murder could not be taken seriously when he made such a heinous charge against judges of superior courts. If this was allowed, incalculable harm would be clone to the judiciary which was administering justice without fear or favour.

Institutions were like Caeser's wife. They had to be chaste and their chastity and sanctity had to be preserved all the time. In this case the judges of the Lahore High Court had been mercilessly maligned. These judges do not defend themselves but they had been humiliated, insulted and ridiculed.

No one should be allowed to get away with such slanderous accusations against the judges of the High Court. What had to be noted was that it was the accused who was on trial and not the judges who tried him. If the judges were exposed to accusations of this type, the stream of justice would be polluted. Such a situation could not be allowed to prevail, that when an accused was before the High Court, the Acting Chief Justice was picked on for attack; when he filed an appeal to the Supreme Court, the person of Chief Justice of Pakistan was the target of his venom.

The counsel quoted the case of a solicitor in New Zealand who, as Mr. Yahya Bakhtiar had done, in the grounds of appeal had attacked the integrity of the

judges. The appellate court had sealed the grounds of the appeal, tried the solicitor and sent him to jail for contempt.

Mr. Justice Nasim Hasan Shah observed that the Supreme Court had also acted similarly in the case of Mr. S.M. Haq, an advocate.

Mr. Batalvi said that the prosecution had produced sufficient evidence to show that out of all the accused, the motive rested only with one, namely Mr. Bhutto who was agitated and perturbed by the virulent criticisms of Ahmad Raza Kasuri, who was exposing the character of Mr. Bhutto which he was trying to conceal from the general public.[134]

As Kasuri detected the real Bhutto behind the face of a demagogue democrat, his virulence grew. This created a situation where Ahmad Raza Kasuri became the target of the appellant's heinous design. No evidence had come to light that there was any other motive on the part of any other accused. Even with the "controlled, manipulated and dishonest investigation", nothing could be unearthed to place the blame of this crime on the shoulder of somebody else.

The counsel submitted that it had been suggested that Masood Mehmood might have had his own motive to kill Ahmad Raza Kasuri. This was a monstrous proposition without any evidence to support it. But even if it was believed, without conceding, it would be of no avail to the defence. If Masood Mehmood was the person who had a motive in having Ahmad Raza Kasuri eliminated, the FSF connection with the crime had-already come to light, what was done during that period? Was Masood Mehmood included in the investigation? Is there any evidence to show that any step in that direction was taken? The only evidence we have in the case was filed untraced. In such a state of affairs, various questions demand answers. Was it that joining Masood Mehmood in the investigation would have resulted in the apprehension of the true culprit? Was Masood Mehmood the first rung of the ladder? Why he was not included in the investigation? There is only one answer to these questions and that clearly points towards the guilt of the appellant.

Referring to the Shafi-ur-Rehman Tribunal report, Mr. Batalvi said his case was that it was not admissible in evidence and was being read as part of the record, tentatively on the directions of the Supreme Court. Nevertheless, this report demolished the defence version. Mr. Justice Shafi-ur-Rehman had arrived at the following conclusions:

1. The attack was directed at the life of Ahmad Raza Kasuri and it was only incidental that his father Nawab Mohammad Ahmad Khan had been killed.

[134] *Morning News*, September 17, 1978.

2. It appeared that the Islamabad and the Lahore incidents had the same nature. They had a common inspiration and organisation.

3. The motive of the crime was political.

4. The perpetrators of the crime were well-organised, well equipped, resourceful and consistent.

5. Another attack on Ahmad Raza Kasuri was likely.

6. The police had shown reckless neglect regarding the recoveries and the protection of empties, and foundations were being laid to file the case as untraced.

7. The investigation was casual and superficial.

He submitted that there was a hierarchy of official control. No one could justify the kind of investigation that had been carried out. If Mr. Bhutto was innocent, his desire should have been to find the culprit so that his own name was cleared. On the other hand, the investigation was casual with a view to filing the case as untraced.

The counsel submitted that the following directions had been given by Justice Shafi-ur-Rehman to the authorities:

1. A more thorough examination of the spot at which the murder took place.
2. An endeavor to find out the class of weapons used.
3. Interrogation of the patrol party.
4. Recording the statements of the surviving occupants of the ill-fated car.
5. Providing protection to the witnesses and the suspects.

No direction used by the tribunal had, however, been followed and it remained an exercise in futility. This provided the correct meaning to the statement of Saeed Ahmad Khan that he had directed the police to proceed with "care and caution" and to conduct the investigation on the "right lines". These directions meant that the investigation should be bungled, and the case be filed untraced. It was buried five feet below the ground but the ghosts had a way of coming back, and they did.

Continuing his arguments Mr. Ijaz Husain Batalvi, told the Supreme Court on September 18 that Mr. Z. A. Bhutto had a motive to physically eliminate Mr. Ahmad Raza Kasuri as the latter was puncturing the balloon of the new image that the PPP leader was building up for himself.

Mr. Ahmad Raza Kasuri, he said, had missed no opportunity of hitting out at the most sensitive part of Mr. Bhutto's psychology. He had debunked the theory that Mr. Bhutto was a democrat, saying that he had been associated with Ayub Khan's Government and if that set-up was anti-people, so was Mr. Bhutto's. He had held Mr. Bhutto responsible for the break-up of Pakistan and propagated

inside and outside the Parliament that Mr. Bhutto had great lust for power.

Mr. Batalvi submitted that the question whether Mr. Bhutto wanted the elimination of Ahmad Raza Kasuri or not depended upon their personal inter-relationship and agreed with the Counsel for the appellant, Mr. Yahya Bakhtiar, that they had a love-hate relationship.

Quoting exhaustively from Mr. Raza Kasuri's speeches in Parliament, Mr. Batalvi said he had become a permanent thorn in the flesh of Mr. Bhutto. In these circumstances, Mr. Bhutto decided to silence the tongue once for all which was lashing at him all the time. The reaction of Mr. Bhutto might have been inhuman but it was not inhuman. From the physical elimination of Ahmad Raja Kasuri, Mr. Bhutto could have derived two advantages. He could silence someone who was never tired of criticizing him, and he could make an example out of him so that the others should not follow his footsteps.

Mr. Batalvi submitted that it had been held by the Supreme Court that atrocious crimes were at times committed for very slight motives not only for seeking revenge but also to gain small pecuniary advantage to drive off difficulties for a time. He also relied on the ruling of the Lahore High Court that motive need not be comparable in degree to the gravity of the offence. Different motives bore different weights for individuals.[135]

Mr. ljaz Hussain Batalvi, submitted, that since the prosecution between the Martial Law Authorities and the judiciary. It has been one of Mr. Bhutto's paramount aims and intentions, since a number of years, to destroy all existing judicial institutions in the country. The said aim has been pursued by him, in collaboration with his cabinet colleagues, vigorously over the years. It was in pursuance of the said objectives that he arbitrarily introduced a number of Constitution amendments with the aim of curtailing the power and jurisdiction of the superior courts in Pakistan. He groundlessly accused the superior judiciary of usurping a jurisdiction not vested in it and alleged that some of its members were playing politics. A petition for contempt of court in relation to the above, however, is still pending in the Supreme Court. The present petition, by means of which a critical situation is sought to be created, is a continuation of the said aims and is, as anyone can see, intended to cause irreparable harm to the judiciary itself.

"9. That the Chief Martial Law Administrator has publicly stated on a number of occasions, that the present is a transitional phase which is intended to restore normal constitutional procedures and institutions as rapidly as is consistent with an orderly process for the transfer of power to the duly-elected

[135] *Pakistan Times,* September 19, 1978.

representatives of the people. Mr. Bhutto, however, is desirous of creating chaotic and anarchic conditions in the country which will prevent and or delay the peaceful expression of opinion by the electorate through the medium of the ballot box.

"10. That earlier Mr. Bhutto had, while acting in gross violation of his constitutional duties and obligations subverted and prevented the holding of free and fair elections so as to perpetuate his tenure of office which had commenced by means of an extra-constitutional act namely his induction into office under the cover of Martial Law. Since political power had been illegally acquired and retained by Mr. Bhutto, and the Government of Pakistan was being carried on unconstitutionally and illegally and in furtherance of Mr. Bhutto's unbridled desire for personal aggrandizement and unjust enrichment at the expense of the public exchequer drastic measures were necessary to restore the country to normal constitutional channels.

"11. That ample evidence exists to implicate Mr. Bhutto and his colleagues in a large number of subversive and illegal activities. Charges of the utmost seriousness including the charge of high treason are at present being investigated. It is necessary that no impediment be placed in the course of these investigations and Mr. Bhutto and his colleagues be given no opportunity to confer together in furtherance of their illegal activities. It is also necessary that all pending proceedings against the detenus be allowed to continue without let or hindrance so that the holding of elections is not delayed. Present petition is a procedural maneuver to bypass the jurisdictional hierarchy of Court and to reach the Supreme Court without, in the first instance, submitting to the jurisdiction of the High Court of the provinces to enforce the fundamental rights that the detenus wrongly claim have been denied by the Martial Law Authority.

"12. That in all the circumstances, it is the duty of the Chief Martial Law Administrator to ensure:

A. The Security and integrity of the State, and
B. The peaceful and orderly transition to normal constitutional procedures.

The Chief Martial Law Administrator proposes and intends to carry out his duty.

"13. That since the governance of Pakistan was being carried on unconstitutionally and illegally by Mr. Bhutto and his collegues and no possibility existed of a return to normal constitutional rule as long as Mr. Bhutto remained in *office,* it was therefore, necessary to resolve the impasses by the imposition of Martial Law.

"14. That imposition of Martial Law is recognised as a judicial phenomenon on the plane of jurisprudence and is justifiable by reference, *inter alia,* to the

doctrine of necessity. However, its basic validity derives from and is dependent on the realities of the situation. During the continuance of Martial Law, it is necessary that all organs of the State accept its imposition and recognize it as the organic law of the State for the duration of the phase during which the circumstances which led to its promulgation exists.

"15. That without prejudice to the above, it is submitted that the present petition is not maintainable even in terms of Article 184 of the Constitution where under it has purportedly been filed.

"16. That Article 184(3) confers power on the Supreme Court to make an Order only if a question of public importance with reference to the enforcement of fundamental rights is involved. Such an Order can only be in terms of the said Article, of the nature mentioned in Article 199.

"That Article 199 (1) (c) makes it clear that no orders for the enforcement of fundamental rights can be made except on the application of an aggrieved person. It is clear that the petitioner is not an aggrieved person in law and, hence, the petition is not maintainable.

"17. That the frame of the present petition makes it clear that it is of the nature of a *habeas corpus* petition and not a petition for the enforcement of fundamental rights. It ought, therefore, to have been filed in the High Court. It is also in the nature of *a quo warrante* to petition and is thus additionally not maintainable.

"18. That the exercise of the powers conferred on the High Courts under Article 299, is subject to the various constraints specified therein, some of which were introduced by Constitutional amendments for which Mr. Bhutto's Government was responsible. In particular no interim orders can be made under Clause (3-A)(E), which was introduced by means of the 5th Amendment to the Constitution. Thus, quite clearly, no directions can be issued for the transfer of the detenus to the Sihala Rest House during the pendency of the petition.

"19. That since the advocates of the petitioner are not the advocates of the detenus for the purpose of the present petitions, it is submitted that they are not entitled to see them. Similarly, the petitioner is not entitled to meet the detenus.

"20. That in the above circumstances, it is submitted that no useful purpose will be served by direction that the detenus be transferred to Sihala Rest House, nor is such an order within the review of Article 184. Sihala Rest House, in any case, is not suitable for the detention of a large number of persons. The making of such an order will create a serious impediment to the way of the proceedings which are pending and which are likely to be instituted against the detenus and will not be in the national interest.

"21. That no comments are being made regarding the merits of the petition at this stage. The various allegations made therein may however, be deemed to be denied.

"22. That in the petition, it is submitted that it is necessary that this Hon'ble Court may be pleased to first determine the question of its own jurisdiction and the maintainability of the petition prior to issuing any directions to the Martial Law Authorities. No notice of the institution on the present proceedings in this Hon'ble Court as required by its rules was served on the respondent. The Attorney-General was notified by the Court to appear as the law officer of the Court and not on behalf of the respondent. The orders passed on 20.9.1977 are therefore, clearly *exparte* and against the practice of this Court. If necessary, Federation of Pakistan be empowered as to enable it to participate in the proceedings and assist the Court to reach a correct conclusion on the facts and law involved in the case.

"23. It is, therefore, prayed that this Hon'ble Court may be pleased to pass the appropriate orders."

Mr. Yahya Bakhtiar, counsel for Begum Bhutto, filed a miscellaneous application praying that the detenus be brought before the Court on each date of hearing.

Mr. Yahya Bakhtiar also filed a petition for leave to appeal against an order of the Lahore High Court transferring the case from the Bench which had granted bail to Mr. Bhutto, to a Full Bench of five Judges presided over by Mr. Justice Maulvi Mushtaq Hussain, Acting Chief Justice, on the ground that the Lahore High Court was not properly constituted as it had no Chief Justice since Mr. Justice Maulvi Mushtaq Hussain had not taken oath prescribed in the Constitution of 1973 for the Chief Justice of High Court.

The Supreme Court on October 8 asked for a report from the Deputy Director, FIA, Mr. Abdul Khaliq, who investigated the Nawab Mohammad murder case, on an allegation by Mr. Yahya Bakhtiar, counsel for Mr. Z. A. Bhutto, that the police officer had been instrumental in the employment in the FIA of the brother of a confessing accused with a view to persuading the accused to stick to his confession.[136]

Mr. Bakhtiar produced a photostat copy of a letter written in February 1978 said to have been written by Mr. Abdul Khaliq to his senior officers saying that the brother of Rana lftikhar Ahmad should be employed in the FIA since he had

[136] *Pakistan Times*, October 9, 1978.

done a commendable job in making Rana Iftikhar and Mr. Arshad Iqbal, co-accused, stick to their confessional statements. The officers had allegedly said he had made a commitment with Mr. Riaz Ahmad, the brother of Rana Iftikhar that he would be employed as an ALI. He requested his officers to honour the commitment.

The President of Pakistan extended the term of two *ad hoc* judges of the Supreme Court namely Mr. Justice Dr. Nasim Hassan Shah and Mr. Justice Waheed-ud-Din Ahmad.[137] The term of Mr. Justice Nasim Hassan Shah was extended up to June 30, 1979.

The hearing was adjourned to November 14, because Mr. Justice Anwar-ul-Haq was called upon to act as President of the country in the absence of Gen. Zia-ul-Haq.[138] The hearing was resumed on December 5.

The number of judges hearing the case was dwindled from nine to seven by the ending of the tenure of one judge and the inability, "due to sickness" expressed on December 4, by Mr. Justice Wahid-udDin to continue to sit on the bench. The Defence Counsel expressed doubt that Mr. Justice Wahid-ud-din was removed from the bench but the court denied it.[139]

At the resumed hearing on December 12, Mr. Yahya Bakhtiar, pressed for the evidence of defence witnesses of Mr. Aziz Ahmad, former Federal Minister of State; General (Retd) Tikka Khan; and Rao Abdul Rashid, former Inspector General of Police, Punjab. He also requested that Mr. Welch may be recalled for cross-examination and Agha Mohammad Safdar, who recorded the statement of Mr. Ahmad Raza Kasuri was also an important court witness."[140] Nothing however was of any avail.

On February *6*, 1979, after a seven month long hearing, the Pakistan Supreme Court dismissed by a 4-3 majority opinion the appeals of Mr. Bhutto and Mian Mohammad Abbas.[141]

While three Judges disagreed with the majority judgment and expressed the view that both of them should be acquitted, the other four held that the culpability of Mr. Bhutto and Mian Mohammad Abbas had been proved beyond doubt and that the unanimous judgment of the Trial Bench, which comprised five judges of the Lahore High Court, be confirmed.

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137 *Pakistan Times,* November 9, 1978.
138 *Pakistan Times,* November 9, 1978.
139 The Times of India, December 6, 1978.
140 *Pakistan Times,* December 6, 1978.
141 Begum Bhutto's interview to BBC broadcasting on December 1 and reported by *Morning News,* December 2, 1978.

The Court was, however, unanimous in its verdict rejecting the appeals of the other three accused namely, Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad, and upheld and confirmed their convictions and sentences.

The main judgment, spread over 825 pages, was written by Chief Justice Anwar-ul-Haq, with whom Mr. Justice Mohammad Akram, Mr. Justice Karam Elahi Chohan and Mr. Justice Nasim Hasan Shah agreed. However, Mr. Justice Safdar Shah and Mr. Justice Dorab Patel disagreed with the majority view. Both of them wrote separate judgments expressing the view that the appeals of Mr. Z.A. Bhutto and Mian Mohammad Abbas be allowed, their sentences and convictions be set aside and they be acquitted and set at liberty. The third agreed with this view.

The judgment was announced in a packed courtroom by the Chief Justice, Mr. Justice Anwar-ul-Haq.

The Judgment

"The cumulative effect of all this oral and documentary evidence is to establish conclusively the existence of motive on the part of appellant Zulfikar Ali Bhutto and the existence of motive on the part of a conspiracy between him, approver Masood Mehmood, approver Ghulam Hussain and appellants Mian Mohammad Abbas, Ghulam Mustafa, Arshad lqbal and Rana Iftikhar Ahmad. It is significant that the task was entrusted to the Director-General of the Federal Security Force who was made personally responsible for its execution. The various subordinate officers were inducted at various levels and at various stages for the execution of the conspiracy through the employment of highly sophisticated and automatic weapons of the Federal Security Force as well as its trained personnel.

"It is true that most of the evidence was collected in this case after the promulgation of Martial Law, but I have not been able to persuade myself, that highly-placed officers like Masood Mehmood, Saeed Ahmad Khan, M.R. Welch, DIG Abdul Vakil Khan, SSP Mohammad Asghar Khan and a host of other smaller officers, have all come forward to concoct a false story against the former Prime Minister under pressure from the Martial Law Authorities.

"Masood Mehmood and Saeed Ahmad Khan had enjoyed positions of special privilege and power under Zulfikar Ali Bhutto, and were in constant and close touch with him throughout his years in office right up to his fall on the 5th of July, 1977. In view of their seniority, age and experience, and their close association with the former Prime Minister, and the privileges enjoyed by

them under his patronage, it is difficult to believe that they would falsely fabricate such detailed evidence against him.

"Even if they were under any pressure to falsely implicate the former Prime Minister, I have not been able to discover any reason why people like Masood Mehmood, M.R. Welch approver Ghulam Hussain and witnesses Fazal Ali and Amir Badshah Khan should falsely implicate appellant Mian Mohammad Abbas who was holding the rank of Director in the Federal Security Force at the relevant time.

"These circumstances lend assurance to their evidence, which in any case, stands amply corroborated by contemporaneous documents to which extensive references have already been made. It may also be observed here that it is true that some of the confessing accused expressed their willingness to confess after they had been in detention for four to six weeks, but this factor is irrelevant once the approver has appeared in court to give direct testimony and subjected himself to cross-examination. In any case, his evidence is not to be accepted unless properly corroborated. In the present case, this requirement has been more than amply fulfilled.

"It has also to be remembered that the case was registered as long ago as the early hours of the morning of 11th of November, 1974 and the Prime Minister's name had been clearly mentioned therein by the complainant Ahmad Raza Kasuri. In spite of the identity of ammunition used in the Islamabad incident and the Lahore incident being established and clearly pointing to the use of the Federal Security Force, both the cases were filed as untraced. There is no explanation as to why the investigation was not allowed to be conducted properly and independently, except that the Prime Minister must have apprehended that if the investigators were to reach the Director-General of the Federal Security Force, he might divulge the whole plan. It is significant that the expert reports, to the admissibility of which objection was taken by the defence during the course of arguments in this case, were obtained by Lahore and Islamabad Districts Police officers from the same ballistic experts, namely the Inspectorate of Armaments, Q.H.G. leaving aside the question of their legal admissibility, which is only a technicality for the purpose of the trial, the police officers engaged in the investigation of the two incidents had obviously no doubt that the crime empties found had been fired from Chinese automatic weapons of 7.62 mm. calibre. In spite of this valuable information being available, no steps at all were taken to take the investigation into that direction. The confessing accused and the two approvers could not have prevented such a probe.

"In these circumstances there is absolutely no support for the contention that the present case was politically motivated, or was the result of international

conspiracy. The case having been registered almost three years before the ouster of the appellant from power, and a clear indication being available as to the possible identity of assailants, not only in the kind of ammunition used in both the incidents but also in the report of the Shafi-ur-Rehman Tribunal, the investigation was deliberately allowed to be stultified. It is, therefore, futile to urge that the prosecution of the appellant is politically motivated, or a result of international conspiracy.

"As a result of the very detailed and exhaustive examination of the evidence of the two approvers, supported as it is, by a mass of oral and documentary evidence, I am left in no doubt that the prosecution has fully succeeded in establishing its case, namely, the existence of the conspiracy, the identity of conspirators and also the further fact that the death of Ahmad Raza Kasuri's father Nawab Mohammad Ahmad Khan, deceased was a probable consequence of the aforesaid conspiracy, and was brought about during the course of a murderous assault launched on Ahmad Raza Kasuri in pursuance of this conspiracy. Of these findings, all the convictions recorded against the appellants are fully justified, except that in the case of appellant Zulfikar Ali Bhutto, Mian Mohammad Abbas and Ghulam Mustafa, Section 301 of the Pakistan Penal Code has been found by me to be inapplicable, as this Section applies only to the actual killers, which in this case means Arshad Iqbal and Rana lftikhar Ahmad."

The Chief Justice observed that the oral and documentary evidence led by the prosecution had succeeded in establishing the following facts, without reasonable doubt:

"(i) Ahmad Raza Kasuri, who was an admirer of appellant Zulfikar Ali Bhutto, and became one of the founder members of the Pakistan People's Party, was made the Chairman of the local branch of the party in the Kasur, and subsequently awarded the party ticket for election to the National Assembly of Pakistan in the elections held in December, 1970, and was so elected. However, thereafter differences began to develop between the two, and Ahmad Raza Kasuri became a virulent critic of the person and policies of the appellant, both inside and outside the Parliament. He lost no opportunity of accusing appellant Zulfikar Ali Bhutto of being power-hungry, and being responsible for the break-up of Pakistan. He made speeches in Parliament criticizing the provisions of the Constitution which, in his view, were aimed at perpetuating the rule of one man, and stuffing human freedom and rights in Pakistan He even refused to sign the 1973 Constitution which had the support of all sections of the National Assembly and ultimately he broke away from the Pakistan People's Party and joined the Tahrik Istiglal Party of Pakistan. The records of the Parliament contain ample evidence of the outspoken and bitter criticism of Ahmad Raza Kasuri against the appellant.

"(ii) The climax, or the breaking point was reached on the 3rd of June, 1974, when a highly unpleasant altercation took place between the two on the floor of the Parliament during the course of which Z. A. Bhutto told Ahmad Raza Kasuri to keep quiet, adding 'I have had enough of you; absolute poison. I will not tolerate your nuisance'.

"(iii) (a) The motive to do away with Ahmad Raza Kasuri is thus firmly established on the record on the part of appellant, Z.A. Bhutto. During the lengthy cross-examination of Masood Mehmood and other prosecution witnesses, no tangible motive was shown to exist on the part of either Masood Mehmood or Saeed Ahmad Khan, or any of the other accused persons involved in this case, to arrange for the assissination of Ahmad Raza Kasuri through the Federal Security Force.

''(b) Ahmad Raza Kasuri was certainly not a non-entity insofar as the PPP was concerned. In one of the letters written by the appellant to Kasuri the latter was praised very highly and described as a man of crisis. Even his speeches in Parliament display his flair for pungent speech. His surveillance and subsequent pursuit by the former !Prime Minister's Chief Security Officer and his assistant show his importance to the appellant.

"(iv) It was at this juncture that Zulfikar Ali Bhutto entered into a conspiracy with approver Masood Mehmood, who was then the Director-General of the Federal Security Force, to get Ahmad Raza Kasuri eliminated through the agency of the FSF. The exact direction given by Zulfikar Ali Bhutto to Masood Mehmood was to 'produce the dead body of Ahmad Raza Kasuri, or his body bandaged all over.' In spite of the fact that Masood Mahmood protested to the then Prime Minister against the carrying out of such a task, yet all his subsequent actions show that he became a voluntary participant in the design to eliminate Ahmad Raza Kasuri and for this purpose, he inducted appellant Mian Mohammad Abbas into the conspiracy, whose name had also been indicated to Masood Mehmood by Z. A. Bhutto saying that this man was already in the know of the thing having been given instructions in this behalf by Masood Mehmood's predecessor, Malik Haq Nawaz Tiwana.

"(v) Mian Mohammad Abbas inducted approver Ghulam Hussain as well as appellants Ghulam Mustafa, Irshad Iqbal and Rana lftikhar Ahmad, directing them to assist Ghulam Hussain in this task. He also gave instructions to witnesses Amir Badshah Khan and Fazal Ali for the supply of arms and ammunition to Ghulam Mustafa and Ghulam Hussain for this purpose.

"Ghulam Hussain had been specially selected for the task as he had been a commando instructor in the Army for 14 years, and had also demonstrated his capabilities in this behalf by running a commando course for the Federal Security Force under the direct supervision of Mian Mohammad Abbas, and

had been given rapid promotions from A.S.I. to S.I. and to inspector in less than a year.

"(vi) That it was in pursuance of this conspiracy that an abortive attack was made on Ahmad Raza Kasuri's car in Islamabad on the 24th of August 1974. Ahmad Raza Kasuri promptly registered a case in this behalf at the Islamabad police station, and the investigating officer Nasir Nawaz was able to recover five crime empties bearing the mark 61405 mark 661/71 and expert examination showed that they were of 7.62 mm. bore, i.e., of the type which was in use with units of the Federal Security Force. However, this case was filed as untraced, although Ahmad Raza Kasuri tabled a privilege motion in the National Assembly.

"(vii) When the Prime Minister and Masood Mehmood were together in Quetta, Z. A. Bhutto again gave instructions to Masood Mehmood to take care of Ahmad Raza Kasuri during the latter's proposed visit to Quetta. Masood Mehmood thereupon gave instructions to his local Director, M.R. Welch, who has given oral and documentary evidence in support of his part of the prosecution case. A study of the documents proved by M.R. Welch leaves no doubts whatsoever that there was indeed, a conspiracy to get Ahmad Raza Kasuri killed during his visit to Quetta but he escaped owing to the fact that M.R. Welch did not play the game. The correspondence proved by M.R. Welch shows beyond doubt that Mian Mohammad Abbas was fully in the picture at that stage. The oral testimony of M.R. Welch further establishes that the reason for getting Ahmad Raza Kasuri killed was that he was making obnoxious speeches against the Prime Minister.

"(viii) After the failure of the Islamabad incident, and inability of M.R. Welch to take care of Ahmad Raza Kasuri during his visit to Quetta in September 1974, the scene of activities shifted to Lahore. The whole plan was again master-minded by Mian Mohammad Abbas through approver Ghulam Hussain and the other appellants already named. As a result, the attack was eventually launched upon Ahmad Raza Kasuri's car when he was returning home after attending a marriage in Shadman Colony. Thirty rounds were fired from automatic weapons at a carefully selected road junction, as a consequence whereof Ahmad Raza Kasuri's father Nawab deceased was hit and later died at the United Christian Hospital at 2.55 a.m. on 11th of November, 1974. The evidence clearly establishes that the actual attack was made by appellants Arshad Iqbal and Rana Iftikhar Ahmad after the plan had been finalized by consultation among approver Ghulam Hussain, appellants Ghulam Mustafa and .Arshad Iqbal as well as Rana Iftikhar Ahmad.

"(ix) In the First Information Report, registered soon after the death of his father, Ahmad Raza Kasuri clearly stated that the attack was launched on him as

a result of political differences, and that he had previously also been similarly attacked and he recalled that an unpleasant incident had taken place between him and Zulfikar Ali Bhutto in the Parliament in June, 1974.

"(x) The calibre of 24 empties recovered from the scene of the crime again showed that they were of 7.62 mm. bore, and they had the same marking, namely, 661/71 as was the case with the crime empties recovered after the Islamabad incident. The investigations of the case did not however, make any headway.

"(xi) A tribunal presided over by Mr. Justice Shafi-ur-Rehman of the Lahore High Court was appointed by the Punjab Government to enquire into the incident, but its report was not allowed to be published for the reason that the provincial Chief Minister, who was fully competent to decide the question of publication 'respectfully' sought the advice of the appellant in the matter. The original report of the tribunal has not been traced, but an office copy of the letter written by the Chief Minister of the Punjab to the former Prime Minister gives a gist of the conclusions and findings of the tribunal and also the directions given by it for further investigation of the case. However, nothing came out of further investigation, and ultimately the case was filed as untraced on the 1st of October, 1975.

"(xii) In the meantime, Ahmad Raza Kasuri kept on clamouring,. for justice, and demanding the resignation of the then Prime Minister on the ground that he would not get justice as long as Z.A. Bhutto• was in power. In spite of the identity of ammunition used in both the incidents at Islamabad and Lahore, the investigation was not allowed to travel in the direction of the Federal Security Force owing to the intervention of the Prime Minister's Chief Security Officer, Saeed Ahmad Khan, and his assistant the late Abdul Hamid Bajwa. The senior officers of the Punjab Police like DIG Abdul Vakil Khan, SSP Mohammad Asghar Khan and DSP Mohammad Waris have also testified that they did not have a free hand in the matter of this investigation, and everything was being done in accordance with the directions given by the Chief Security Officer and his assistant.

"(xiii) When the case was reopened after the promulgation of Martial Law in Pakistan on the 5th of July, 1977, it was found that there was voluminous documentary evidence to show the intermeddling of the Prime Minister's Chief Security Officer and his assistant with the investigation of the case, so much so that even a copy of the-report of the Shafi-ur-Rehman Tribunal was found to have been sent to Saeed Ahmad Khan by the Chief Secretary to the Punjab Government indicating that the matter had already been discussed between the two. It also transpired that both the officers on the staff of the appellant had been making frequent visits to Lahore during the pendency of the inquiry before

the tribunal, as well as subsequently. The testimony of Saeed Ahmad Khan, supported by relevant documents, unmistakably shows that all this was being done under the directions of the appellant and he was kept fully informed of the day-to-day progress of the activities.

"(xiv) There is also voluminous oral and documentary evidence to show that after the murder, Ahmad Raza Kasuri was kept under special surveillance and reports on his activities and utterances were being submitted to the former Prime Minister in quick succession by the late Abdul Hamid Bajwa and Saeed Ahmad Khan. Even the physical description and identity of the gun-man engaged by Ahmad Raza Kasuri was brought on the record.

"(xv) In the final phase, efforts were initiated by the appellant to bring Ahmad Raza Kasuri back to the fold of the Pakistan People's Party, and this task was entrusted to his Chief Security Officer Saeed Ahmad Khan and Abdul Hamid Bajwa. The prosecution had placed on the record an exceptionally large number of documents which leave no doubt whatsoever that in a subtle manner these two-experienced Police officers were working on a much younger man like Ahmad Raza Kasuri and almost succeeded in convincing him that his political future and the safety of his own life and family lay in a. *rapprochement* with the Prime Minister. After a careful and detailed analysis of these documents, I am left in no doubt at all that the moves had been initiated by the appellant Z. A. Bhutto otherwise the repeated visits of his senior officers like Saeed Ahmad Khan and Abdul Hamid Bajwa to this disgruntled politician did not make any sense. In fact, the last document in the series significantly speaks of 'negotiations' having been conducted for the last six months with Ahmad Raza Kasuri so as to bring him back to the Pakistan People's Party. This part of the evidence makes it clear that these moves were initiated so as to silence Ahmad Raza Kasuri, who was still persisting in his loud demand for justice against the sitting Prime Minister. As a result of these moves, Ahmad Raza Kasuri did return to the People's Party and was shown petty favors including his deputation on a Parliamentary delegation to Mexico, from where he sent a report eulogizing the leadership of the appellant. In evidence he has asserted that he had to adopt this instance as a matter of self preservation. All these acts of subsequent conduct are relevant under Section 8 of the Evidence Act, and are incompatible with the appellant's innocence.

The judgment also held that the Trial Bench of the Lahore High Court was lawfully and properly seized of the case on its transfer to its original side and there was no question of the Judges of the Bench having the slightest pecuniary or proprietary interest in the subject matter of the proceedings. The apprehensions in the mind of Z. A. Bhutto, if any, about the partiality *or* prejudices of the Chief Justice of the Lahore High Court were baseless.

"The judgment stated that the allegation of bias leveled against the Acting Chief

Justice in his capacity as the Chief Election Commissioner by the Central Executive Committee of the Pakistan People's Party was totally misconceived. In fact, on 24.9.1977 at the hearing in Court, the appellant had for once, himself expressed his confidence in the learned Acting Chief Justice. The fact that in the circumstances, the Trial Bench did not allow an opportunity to the appellant to meet his learned Counsel did not betray any bias of the Court against him. At the commencement of the trial the dock had to be prepared for segregating the accused from the visitors in Court and there was no *ntala fide* of the Court about it. Strictly, speaking, the allegations in connection with the 'Dock' and the 'Benches' had nothing to do with the actual proceedings conducted in the case. The appellant at times got unruly. This is in addition to the fact that he had repeatedly all along indulged in baseless allegations of a scurrilous and scandalous character against the learned Acting Chief Justice with scant regard for the contempt of Court so often committed by him. Even the Press Talk by the learned Acting Chief Justice that the trial would be held in the full light of the day attracted the wrath of the appellant to vilify him and strangely enough was taken to be an expression of bias on his part. The allegations that the record of the case was manipulated and tailored in a fashion to suit the prosecution is devoid of any force and the appellant has failed to substantiate it. Indeed, the entire proceedings in the trial Court were tape-recorded and this could have been easily verified in case the appellant was at all serious about his allegations. In this connection, it seems that most of the grievances put forward by the appellant were imaginary rather than real. I have already found evidence against the appellant in connection with his other grievances contained in his petition dated 18-12-1977. His allegations were based on mistrust and suspicions entertained by him from the very beginning shown against the Court, without any justification or surmises and conjectures.

"It is a pity to find that from the very beginning the appellant entered upon his trial with an initial bias ingrained into him against the Court, and as the prosecution evidence involving him began to pour in, he, instead of defending himself, became more and more defiant and indulged in scurrilous and scandalous attacks on the Court. He was thus responsible for having created a tension and it was rendered increasingly difficult for the Court to maintain the decorum and control the proceedings.

"The conclusion I have held that the impugned judgment of the learned Trial Court is substantially based on the evidence on the record and its conclusions are well founded. Indeed, I have agreed with the learned Trial Bench and substantially affirmed its findings on all the material issues raised in this case. As discussed above, the allegations of bias against the Trial Bench are unfounded. In spite *of* the heavy odds the procedure followed at the trial in the case, as held by me above, was warranted under the law and it did not in fact occasion and result in any prejudice caused to the appellant."

The Chief Justice observed in the judgment: "In paragraphs 610 to 616 to the impugned judgment, the High Court has made gratuitous observations about the personal belief of the appellants and delivered a sermon as to the mode of conduct prescribed by Islam of a Muslim ruler. It is also stated that the appellant was a 'Muslim in name' only and that he had abused his powers under the Constitution. I am inclined to agree with the learned Counsel that the observations in these paragraphs were not necessary for the disposal of the case by the High Court. In this connection, however, the learned Counsel further submitted that these observations and remarks about the appellant disclose the extreme hostility and bias entertained on the part of the learned Trial Bench against the appellant. It, however, appears to me that the High Court had found the appellant guilty along with the other co-accused on the merits of the evidence adduced in the case. Its findings to that effect were not influenced by any such extraneous considerations. In fact, it was only towards the end of the judgment that this discussion occurs and the conclusion was drawn in proposing the punishment as stated in paragraph 617 that the appellant was 'thus liable to deterrent punishment'. Although observations were not strictly relevant, yet that did not thereby vitiate the order or conviction of the appellant which was not based on any such extraneous considerations.

"In the proceedings as well as in the impugned judgment the learned Trial Bench has often used the term principal accused. in referring to the appellant. In that connection stress was laid before us by the learned Counsel to contend that this by itself sufficiently disclosed bias and prejudice of the Bench towards him. But it is evident that on the findings, recorded by the Trial Court, the appellant alone had the motive behind the attempted murder and had thought about it. Even otherwise having regard to his status in life he was the principal amongst the co-conspirators, and occupied the most important position amongst them. It cannot, however, be denied that strictly speaking, in law, the description of the appellant as the principal accused as an abettor was inapt. But this by itself is not sufficient to betray any bias and prejudice of the Court against him who was otherwise found guilty on the merits. Similarly, the mere use of the other terms like the 'arch culprit' and 'compulsive liar' *etc.*, against the appellant do not go to prove the bias of the Court against a guilty accused.

"One last contention advanced by the prosecution in this connection may also be mentioned here in passing. The Trial Bench consisted of five learned Judges of the High Court including its learned Acting Chief Justice heading it. Each one of the Judges was independent and not susceptible of any influence of the learned Acting Chief Justice in their judgment. The allegations alleged in this case were almost entirely directed against the learned Acting Chief Justice. In these circumstances, the independent opinion expressed by the other learned Judges constituting the Bench was entitled to its due weight and respect."

The Chief Justice finally observed on this issue that: "In the light of declared law and the facts, I have reached the conclusion that although some of the orders made by the Trial Bench in the day-to-day conduct of the case may not have been correct on a strict view of the law and some others may not have been fully called for in the facts and circumstances of the case, yet these were all matters within the discretion of the Court, and mere error therein cannot amount to proof of bias. The appellant was unfortunately misled into thinking from the very start of the case that the learned Acting Chief Justice was biased against him. There was, in fact, no factual basis for such an apprehension. *In* any case, there was no such apprehension in respect of any or the other four learned Judges constituting the Bench. The trial of the appellant has, by and large, been conducted substantially in accordance with law and the conclusions reached by the High Court on the merits of the case have been found to be correct on detailed analysis of the evidence and the law. I would, therefore, repel the contention that the trial was, in any manner, vitiated by reason of bias on the part of the presiding Judge of the Bench."

Maintaining that this was an unprecedented trial involving a former Head of the Government and for this reason the proceedings before the Trial Bench were of a particularly difficult and taxing nature, the judgment said: "Unfortunately, the task of the Bench was not made any the easier by certain attitudes adopted by appellant Zulfikar Ali Bhutto at various stages of the trial. **In** this Court, major part of the arguments addressed by the defence were devoted to demonstrating that the trial had not been held fairly, and that it suffered from a large number of procedural illegalities, which went to the root of the matter, vitiating the whole trial, and the convictions and sentences recorded as a result thereof. My examination of these submissions, ranging over almost the entire field of criminal procedure, has led me to the conclusion that by and large the trial was held substantially in accordance with the provisions of the Criminal Procedure Code and that any omissions, errors or irregularities, or even illegalities, that have crept in were of such a nature as did not vitiate the trial, and were certainly curable under the provisions of Section 537 of the Criminal Procedure Code as it now stands in its amended form since 1972.

"I have further found that the allegations of bias against the presiding Judge of the Bench and criticism of the actions and orders made by the Bench during the course of the trial are not justified. In spite of the events, and the background alluded to by the appellant and his Counsel, the High Court Bench of five judges has done its best to conduct the trial as fairly as possible, in the circumstances then prevailing."

The Court observed: "It cannot be denied that in the Trial Court a number of applications were filed from time to time in which unfortunately scandalous

and scurrilous allegations were made, mostly against the present Chief Justice, who headed the Trial Bench constituted for the trial of this case in the Lahore High Court. In the course of the hearing in this appeal before us also, those allegations were repeated on behalf of the appellant to contend that the entire trial stood vitiated because of bias in the learned Chief Justice. The blasphemous allegations attributing bias and motive, made in the face of the Judges of a superior court constitute one of the worst forms of contempt, and these were repeated with impunity in this case to defame the Judge and the Court, with scant regard for the dignity of the law and its enforcing agency, viz., the Court. In the course of this trial, the appellant who was no less a person than the former President and Prime Minister of the country, appears to have adopted an openly hostile attitude in Court and became defiant towards the end, and it became all the more arduous for the Court to conduct the trial. He appears to have further developed a strategy and started indulging in vilification and insults towards the Court and wanted publicity for it, without caring for his own defence in the case. Indeed, the unfortunate situation thus created became all the more embarrassing to control at the trial.

"It appears, therefore, that from 25th of January, 1978, onwards, the Court had a genuine and reasonable apprehension that the appellant was out to further indulge in scurrilous and scandalous allegations against it and wanted publicity for it. This was likely to result in undermining the dignity of the High Court and shake the confidence of the people in it. In these circumstances, the Court was left with no alternative but to hold further proceedings in camera in the larger interest of the administration of justice and this it had power to do in the exercise of the discretion vested in it under the provision to Section 352 of the Code.

"On 25th January, 1978, the Court also observed that a few of the supporters of Zulfikar Ali Bhutto, appellant, were found shouting and yelling in the corridor outside the Chief Justice's Chamber. This raised a further apprehension in the mind of the Court about a likely disturbance in the proceedings of the Court, if held in open and for this additional reason as well, the Court was justified in holding further proceedings in the case in camera. Before us, the learned counsel vaguely expressed his doubt about the genuineness of this last-mentioned order passed on 25-1-1978, but this appears to be a wholly unjustified allegation, and does not deserve any serious consideration. Before concluding discussion on this matter, it would not be out of place to repeat that the entire prosecution evidence in this case was recorded in open Court.

"Appellant Zulfikar Ali Bhutto did not produce any evidence in defence. Most of his own examination as an accused under Section 342 Cr.P.C. was also conducted in open Court. In these circumstances, I am satisfied that the alleged irregularity, if any, in the mode of the trial by holding it partly in camera has not,

in fact occasioned any failure of justice or prejudice to the appellant in his trial or defence. The objection is thus without any force and is hereby repelled.

"As far as the proceedings conducted in open Court are concerned, the appellant can have no grievance if they were reported in the Press or otherwise. It seems to me, however, that publicity ought not to have been given to the statements made by the other co-accused during the time when the proceedings were being held in camera. It is possible, as suggested by the learned Special Public Prosecutor that those statements were allowed to be published for the reason that the camera proceedings has not been necessitated on account of anything done or intended to be done by the co-accused. Whatever, the reason, it would have been better to avoid even the publication of these statements, which were also recorded in camera. The fact, however, remains that the publication of the statements, made by the co-accused during camera proceedings does not, in any manner, detract from the necessity which was clearly made out for excluding the public from this stage of the trial, once appellant Zulfikar Ali Bhutto had notified the Court of his intention to repeat the allegations he had already made unpublished in successive petitions against the presiding judge of the trial Bench."

In his leading judgment, the Chief Justice observed that although in the ground of appeal, as well as in the oral submissions made at the bar, considerable emphasis had been laid on the point that the present case was politically motivated in the sense, that there was an international conspiracy to remove the appellant from power, and to eliminate him both politically and physically, "it is clear that these matters are extraneous to the record of the case and to its judicial determination. The fate of the present appeal must depend not on the motive of those who reopened the investigation of the case on the promulgation of Martial Law on July 5, 1977 but on the strength and weakness of the evidence adduced in support of the allegations made by Mr. Ahmad Raza Kasuri in the first information report made by him as long ago as November 11, 1974, minutes after his father had breathed his last owing to injuries sustained during the attack on the complainant's car. If the requisite evidence satisfying the legal and judicial standards applicable in criminal trials of the present kind, is available on the record to prove the guilt of the appellant beyond reasonable doubt, then the duty of the court is clear, irrespective of the political considerations which might have led to the overthrow of the appellant's Government in July 1977 and the reopening of the present case ... on this view of the matter, we did not think it necessary to go into the details of the alleged international conspiracy alluded to by Mr. Yahya Bakhtiar."

The judgment contained detailed reasons for disallowing three applications made by Mr. Yahya Bakhtiar for calling certain prosecution witnesses for further cross-examination, summoning certain persons as court witnesses and other

defence witnesses. On the last day of the hearing of the appeals, the Supreme Court announced a short order expressing the view that no justification had been made out for granting any of these requests.

Briefly reproducing the arguments of the appellant's counsel and the special public prosecutor, the Chief Justice wrote he was satisfied that the application had no merit in it. It is true that the appellant remained absent from the Trial Court from 13-11-77 to 30-11-77, when 15 witnesses were examined and cross-examined in his absence, but even so he does not seem to have been prejudiced. It is a matter of record that all the said witnesses were cross-examined at length by the learned Counsel for the appellant, that the appellant used to meet his Counsel practically every day in jail, and, therefore, it has to be presumed that the cross-examination of the said witnesses was made in accordance with his instructions, at any rate his approval. Not only this, but no objection seems to have been taken by his learned Counsel as to the faith of Mr. Welch when he declared in the open Court that he had converted to Islam, nor indeed was any question put to him in that behalf during his cross-examination. It is of some interest to note here that Mr. Yahya Bakhtiar, who hails from Quetta, stated at the bar that Mr. Welch had embraced Islam for a brief period in order to be able to marry a Muslim lady. In these circumstances the prayer made in this application is not only misconceived, but belated, as also that in view of the lengthy cross-examination of the witness; the appellant has not been prejudiced.

"Even otherwise, no objection can now be taken to his evidence in view of Section 13 of the Oath Act which runs as : No omission to take any oath or make any affirmation, no substitution of any one or any other of them, and no irregularity whatever, in the form in which any one of them is administered shall invalidate any proceedings or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth. This application is, therefore, dismissed.

"Referring to a prayer made by the appellant that Agha Mohammad Safdar, former Deputy Superintendent of Police, Islamabad, and Col. Wazir Ahmad Khan, Central Armament Depot, Havelian, be summoned, the judgment said, 'After having heard the learned counsel for the parties, I feel that this application must be rejected. It may be noted that in the case of Agha Mohammad Safdar no application was made by or on behalf of the appellant that he be summoned as a court witness. It is true that an application was made on behalf of Mian Mohammad Abbas, but he has made no grievance of the fact as to its dismissal, or that he had been prejudiced. The main reason for which the appellant seems to have missed the opportunity to summon Agha Mohammad Safdar as a witness was because he had boycotted the proceedings.

But this is hardly a ground of his said application. This word 'boycott' is unknown to the legal system of this country. Therefore, the appellant even if he can be said to have a valid grievance against the conduct of the trial by the High Court, ought not to have boycotted the proceedings, and instead placed on the record of the case his written objections pinpointing thereon his reason owing to which he felt that he was not getting a fair trial.'

"Even otherwise the summoning of the said two witnesses at this stage would be a waste of time. The object for which those witnesses are required to be summoned has been effectively achieved as Mr. Ahmad Raza Kasuri and Fazal Ali (prosecution witness *24)* who had produced the said ammunition vouchers have been extensively cross-examined on behalf of the appellant in the High Court. In these circumstances, I find no force in this application and the same is dismissed."

The Court also recorded the reasons for disallowing the prayer made for summoning 10 defence witnesses. These witnesses were Gen. (Retd.) Tikka Khan, Mr. Aziz Ahmad, former Minister of Foreign Affairs, Rao Abdur Rashid, former Inspector- General of Police, Punjab, Director, Press Information Department, Government of Pakistan, officer concerned from the CMLA Secretariat, Record-keeper or any other concerned official of the Lahore High Court, Director, FIA, Lahore Mr. Mohammad Ali (film star), Jam Sadiq Ali, former Minister, Government of Sindh, now in London, and Mr. Ghulam Mustafa Khar, former Governor and Chief Minister of the Punjab, now in London. None of the evidence proposed to be produced through these witnesses, the judgment observed, "has any real relevance to the facts of this case. The appellant too has again pleaded that since he had boycotted the proceedings in the High Court he could not effectively defend himself. This ground is not available to him under the law."

The judgment also laid down the law on a number of provisions of the Criminal Procedure Code and the Pakistan Penal Code. Interpretation of Section 10 of the Evidence Act with regard to admissibility of the statements of co-conspirators, the use of Section 10 with regard to confessions and statements made under Section *342* Cr.P.C. by the accused, the requirements of Section 347 and *164* Cr.P.C. regarding approvers and their statements, the application and scope of Section 540-A of the Cr.P.C. in regard to conducting proceedings in the absence of the accused and failure of the High Court to pass a formal order under this section. The Court also dealt with the legal position when statements of certain witnesses made to the police were not provided to the defence. The admissibility of the log book of the jeep involved in the crime under Section 35 of the Evidence Act, the fact of non-production of certain witnesses by the prosecution, the hearing of miscellaneous applications in chambers, the principles governing the appraisal of approvers' evidence, the

relevance of motive in conspiracy cases, corroboration and credibility of approvers' statements, and reading of evidence regarding subsequent conduct of the accused were some of the propositions on which authoritative pronouncements were given. Another point decided by the Court was the exact nature of the position of an accomplice. And then the Court considered the definition of conspiracy and the nature of conspiratorial agreement, the mode of proof of conspiracy and the application of Section 111 read with Section 301 of the PPC. The Court also discussed in the judgment the immunity available under Section 22 of the Federal Security Force Act of 1973 to the personnel of the force.

In his dissenting judgment spread over 441 pages, Mr. Justice G. Safdar Shah expressed the view that certain statements of Masood Mehmood were in the nature of hearsay and were not admissible in evidence. Secondly, this approver was not a reliable witness and those who were supporting him were witnesses which fell in the category of accomplices. One accomplice could not support another accomplice. He was of the view that the case had not been proved to the hilt by the prosecution. The evidence of the prosecution witnesses was, according to the Judge, unnatural, improbable and untrue and was made up of significant and prominent improvements made to them during their evidence in Court.

The Judge expressed the view that the prosecution had failed to prove the existence of a criminal conspiracy between Zulfikar Ali Bhutto and Masood Mehmood and, therefore, no evidence of it could be brought under Section 10 of the Evidence Act. The Judge said that the prosecution had failed to prove the case against Bhutto and Mian Abbas and the conviction against them should be set aside. According to him the cases of Sufi Ghulam Mustafa, Arshad Iqbal and Rana Iftikhar Ahmad were different since they had admitted the commission of the offence. Accordingly, he expressed the view that he was satisfied beyond doubt that all three of them were guilty and their convictions by the Lahore High Court were proper. He was of the view that all these accused had agreed to fire at the car of Mr. Ahmad Raza Kasuri with automatic weapons. The act of firing by Arshad Iqbal and Rana Iftikhar was not only a reckless act but was an independent act of their own. The case of Ghulam Mustafa was different because he was not at the site.

An independent judgment was given by Mr. Justice Dorab Patel who disagreed with the majority view.

Mr. Justice Dorab Patel observed that "the prosecution case against Mr. Bhutto rests on the evidence of Masood Mehmood and Ghulam Hussain. As both these witnesses are approvers, their evidence cannot be accepted without corroboration which implicates Mr. Bhutto in the crimes for which he was tried. Therefore, the prosecution relied on the evidence of motive which was given by

evidence of Mr. Bhutto's conduct.

Evidence of motive is always a weak form of corroboratory evidence. And apart from the evidence about Mr. Bhutto's alleged interference with the investigation of the murder, the evidence produced by the prosecution about his conduct is of a very equivocal nature, and as it is reasonably capable of an innocent interpretation, it has no corroborative value.

There was nothing in the evidence to show that the approver Masood Mehmood had been asked by Mr. Bhutto whether he would or would not join the alleged conspiracy, and on the contrary, it is clear from his evidence that Mr. Bhutto gave a series of orders to the approver which the approver said he had carried out because he was forced to do so. It is also not irrelevant to point out here that the approver's impression was that Mian Abbas had been given similar orders and further, according to the approver, Mian Abbas had confirmed to him that he had received those orders and that he would carry them out.

Referring to Mr. Yahya Bakhtiar's submission that the trial was vitiated by procedural irregularities and illegalities which had prevented Mr. Bhutto from conducting his defence properly, Mr. Justice Dorab Patel observed that as these irregularities have been listed in the judgment of His Lordship it was not necessary for him to refer to them.

Referring to Mr. Yahya Bakhtiar's criticism of the construction placed by the High Court upon Sections *164, 347* and *342* of the Criminal Procedure Code, he however, observed, "I am not impressed by his submission on this aspect of the case and I agree with the observations in the judgment of My Lord, the Chief Justice on the proper construction of these sections".

Mr. Justice Mohammad Haleem wrote a five-page note agreeing with Mr. Justice G. Safdar Shah. He also expressed the view that the case against Bhutto and Mian Abbas had not been proved but since the other appellants had confessed the crime there was no doubt with regard to their guilt.

Mr. Justice Mohammad Haleem in his separate note agreed with the reasons and the conclusions reached by Mr. Justice Safdar Shah. Mr. Justice Mohammad Haleem, however, observed that "as the prosecution case mainly hinges on the evidence of approver Masood Mehmood, the question arises as to whether he should be believed or not? An overall examination of his evidence has led me to conclude that it is not of the quality on which reliance could be placed. Not only that it suffers from inherent weaknesses but also tends to show that he was a man of conscience whose conduct is wholly unnatural in the background of the facts elicited in his evidence. This feature has opened the gate for the argument as to

whether the alleged order given to him by appellant Zulfikar Ali Bhutto to kill Ahmad Raza Kasuri and his own reaction to it amounted to an agreement within the meaning of Section 120- APPC.

Considering the appalling nature of the defects in his evidence which had been sufficiently dealt with in the judgment of Mr. Justice Safdar Shah, Mr. Justice Haleem said he was firmly of the opinion that his evidence was unnatural and thereby lacked the guarantee to inspire confidence. Lastly, Mr. Justice Haleem said, while giving evidence Mr. Masood Mehmood appeared to sit on the fence trying to minimize his role which is not the ordinary conduct of an approver, such being the state of his evidence it did not appeal to wisdom and he would, therefore, disbelieve him.

About the trial a distinguished French lawyer, deputed to attend the trial on behalf of the .European Human Rights Commission, said that the case "would not stand in a French court for even a few minutes". The former U.S. Attorney-General Mr. Ramsay Clark also expressed much the same view.[142]

Mr. Bhutto was given seven days to petition for clemency but he decided not to do so and asked his family members not to file any petition on his behalf. Miss Benazir Bhutto, who had met her father in Rawalpindi jail on June 15, 1978 stated that Mr. Bhutto had told her "*I shall not allow you to appeal for me. If you do, I shall disown you. I shall divorce my two wives and dissociate myself from my children. I love you very much, but for my honour you must not do this.*"[143]

Shah Nawaz Bhutto told Reuter in London, "As far as the family is concerned, there will be no appeal for clemency. We will respect his wishes."[144]

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[142] *The Times of India,* February 7, 1979.
[143] *Dawn,* June 19, 1978.
[144] *The Times of India,* February 7, 1979.

Renewed Pleas to Save Bhutto

All death penalties, even if lawful are immoral and barbarous. When this weapon is used in political cases it becomes a serious danger to human civilization.

Jayaprakash Narayan

After the confirmation of death sentence by the Supreme Court, in a wafer thin majority, Mr. Bhutto wrote a letter to his son Mir Murtaza at London in which he said that "only God Almighty and the people can save me". Mr. Bhutto also reportedly wrote that outside influence could help save his life. Some of the extracts published under the headline "a letter from the death cell" in London *Daily Express* were reported as follows:[145]

"We all know that I am innocent. We all know that I am the victim of a deep, sordid conspiracy. My biggest achievement was to awaken the downtrodden people of the country and to give them a vote in the affairs of the State. I took them out of the shame of 1971 and restored their honour.

"The important thing is that time will pass, and I must pass through it with honour. Whatever the end, it must be faced bravely. There is no justice in the courts or in the administration. Only God Almighty and the people can save me. For instance, the outside press can play a constructive part."

Clemency appeals that had poured into Pakistan after the High Court verdict became renewed and more urgent after the judgment of the Supreme Court. Taking the matter on humanitarian, moral and political grounds the world leaders made appeals to General Zia-ul-Haq, requesting him to grant clemency to Mr. Bhutto. Amongst those who sent clemency appeals were: Norway's Prime Minister, Odvar Nordhi; Greek Premier, Mr. Constantine Karananlis; King Baudouin of Belgium; Sheikh Jabar Al Ahmad Amir of Kuwait; Amir of Qatar, Sheikh Khaifa Bin Al Thani; French President Mr. Gischard d'Estaing; President Gadaffi of Libya; King Jauav Carlos of Spain; Portuguese President, General

145 *Punjab Kesri,* February 9, 1979.

Antonio Rau alho Eanes; President Ahmad Hasan Al-Baker of Iraq; Algerian President, Mr. Chadli Benjedid; Romanian President Nichuae Cea Uescol; Mrs. Margarat Thatcher of the United Kingdom; Secretary-General of the Commonwealth, Mr. Ralph Paul; the son and wife of former Indonesian President Soekarno; Syrian President Hafeer Al-Asad (for the second time); President of the U.S.S.R. Mr. Breznev; President Anwar Sadat of Egypt; Yugoslav President Tito; Vietnamese Prime Minister Phan Van Dong; Afghan President, Noor Mohammad Tarakki; Kenyan President Daniel Arap Moi; and the Sengalese President, Leopold Sedar Senghor.

President Jimmy Carter of the United States sent a message regarding the punishment to Mr. Bhutto. The State Department gave no details of the message, but did state that the United States would not approve of Mr. Bhutto's execution and hoped that his life would be spared. Later suspicion arose about its seriousness and the U.S. Embassy in Islamabad denied calling the clemency appeal a mere formality. A new communication urging clemency for Mr. Bhutto was sent "in all seriousness."[146]

British Prime Minister James Callaghan, said in London on February 6, "I believe the consequences of clemency—and General Zia is a very wise man—will be more beneficial to his country than carrying out the strict application of the law."[147]

In Ankara, Turkish Premier, Bulent Ecevit, offered asylum to Mr. Bhutto in Turkey and appealed to President Zia to spare his life.[148] In a telegram to the Pakistan President, the Premier said he would guarantee that Mr. Bhutto would not be allowed to engage in political activity if he lived in Turkey.

In Canberra, Australian Foreign Minister Andrew Peacock said the Australian Government would make further representation to Pakistan to exercise clemency "while emphasizing that Australia's expressions of concern should not be interpreted as interference in Pakistan's internal affairs, the Government, for humanitarian reasons, feels compelled to join other countries in asking for clemency."[149]

The Geneva-based International Commission of Jurists and the London-based Amnesty International also urged Gen. Zia to exercise clemency.[150]

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146 *Pakistan Times,* February 7; *Musawaat,* February 25, 1979.
147 *Pakistan Times,* February 7, 1979.
148 *Pakistan Times,* February 7, 1979.
149 *Pakistan Times,* February, 7, 1979.
150 *The Times of India,* February 8, 1979.

The U.N. Secretary-General, Dr. Kurt Waldheim made a third intervention in the case since Mr. Bhutto was convicted.

The West German Foreign Ministry said at Bonn on February 6 that they had let Pakistan know that the execution of Mr. Bhutto would be received negatively by the public opinion in West Germany.

President Sheikh Zaid Bin Sultan of U.A.E. said that keeping in view the efforts of Mr. Bhutto for establishing better relations between the Arab and other countries; on humanitarian grounds his death sentence should be commuted[151]

A message sent by Premier Hua read in part, "I have learnt that the Supreme Court of Pakistan has rejected Mr. Bhutto's appeal and upheld the conviction and death sentence. This is, of course, entirely Pakistan's internal affair.

"However, China is a good neighbours and friend of Pakistan. I express to your Excellency my concern about this matter and appeal to you to use your supreme power and grant clemency to Mr. Bhutto".[152]

Sweden's Prime Minister also cabled an appeal, "My country opposes the death sentence and has worked for many years to abolish that penalty. A decision by your excellency to commute the death sentences, milder penalties would be welcomed around the world as a humanitarian act".

About the appeal from Saudi Arabia, the General was reported to have said in private, "The wishes of King Khaled are my command."[153] Supporters of PPP were also pinning their hopes on King Khaled, because since Gen. Zia came to power, he has been courting Saudi Arabia, visiting Riyadh five times.[154]

Reflecting the general Arab line on the issue, President Assad said in a message to Pakistan's military President that Mr. Bhutto had rendered great services to his country and adopted a noble attitude to Arab causes.[155]

Saudi Arabia made its appeal almost at the last minute. Jordan and Oman were the only countries in the Arab world that did not join the drive.

The Saudi Arabian Ambassador, Sheikh Riyadh Al-Khatib, said he had lodged the appeal; apparently in stronger terms than earlier ones, with General

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151 *Nav Bharat Times,* February 8, 1979.
152 *Dawn,* February 11, 1979.
153 *The Times of India,* February 10, 1979.
154 *The Times of India,* February 10, 1979.
155 *The Times of India,* February 10, 1979.

Zia.[156]

He hoped that "we shall succeed" and added that "we seriously consider anything that we propose to do and King Khaled does not do anything unless he is sure about it."[157]

The Lidian President Mr. Sanjiva Reddy appealed to the Pakistan President to exercise the right of clemency and spare the life of Mr. Bhutto. "I am making this appeal purely on humanitarian grounds. I am confident Gen. Zia will consider this matter with generosity. I wish our neighbour Pakistan's peace and prosperity".[158]

Mr. C. M. Stephen leader of the opposition (Congress-I) in the *Lok Sabha,* urged General Zia to spare the life of Mr. Bhutto cautioning him that "a dead Bhutto will be much more powerful than the living Bhutto". He wanted the General to "see wisdom and sanity in preventing the staging of this major political tragedy. The execution of Mr. Bhutto, if carried out, will be treated in this country as one of a political murder although covered with the trappings of a judicial verdict".

Former Pakistan President Fazal Elahi Chaudhry, wrote in a letter to President Zia-Ul-Haq: "The implementation of the death sentence passed by the Supreme Court of Pakistan against the former Pakistan Prime Minister, Mr. Zulfikar Ali Bhutto, is a matter of grave concern not only for Pakistan but for the international community as well. Nationally it threatens the independence, integrity and sovereignty of the motherland, and internationally it is bound to aggravate, beyond the point of no return, instability in an area of extreme strategic importance to the economy and politics of the whole world.

"The interaction of the various political, economic and social forces as a result of the policies pursued during the 30-year history of Pakistan has brought about a polarization not only between classes, but also between the various religions. It is hardly a. decade when the country was dismembered for these very reasons and we are once again confronted by the spectre of further disasters. And the state of affairs would have been as full of great misfortunes even if the fast winds of sharp changes had not been blowing along the entire south coast of Asia and the neighbouring African countries.

"The situation existing in a neighbouring country threatens to engulf Pakistan in an extremely unhappy predicament and any political or emotional

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156 *The Times of India,* February 27, 1979.

157 *Musawaat,* February 27, 1979.

158 *Musawaat* February 9, 1979.

incident can initiate this process. The execution of Mr. Zulfikar Ali Bhutto can provide much more than a detonation. The subdued reaction can become vocal and ultimately turn militantly violent. The resultant chaos will certainly fulfill the wishes of national enemies.

"It is not without reason that the leaders of the entire civilized world are anxious and concerned about the dangerous consequences that the execution of the former Prime Minister may lead to. The proposed action, instead of strengthening the Federation, would put a great stress on its body and soul and encourage the elements who are bent upon taking advantage of this situation to shatter this delicate structure sooner or later.

"The peculiarities of the judgment are too glaring and solid to be ignored. Three honorable Judges have passed a verdict of clear acquittal. This fact alone is bound to raise grave misgivings in the minds of the general public about the reasonableness of implementing the capital punishment. The inherent prerogative of the executive can certainly come into play without causing the least erosion of the prestige of the judiciary.

"It is a lesson of history that when such extreme sentences awarded by the courts in criminal cases are pregnant with social, political, regional, national repercussions, they can be dealt with better through clemency or commutation. The Courts do not consider these factors, as a matter of policy and procedure, and these are left for the executive to take proper action in a better way.

"It is an unfortunate coincidence, which has been pointed out by news media commentators, that in this case Judges elevated to the Supreme Court from minority provinces have differed from the whole body of the Judges elevated from the majority province in their conclusions about the ultimate fate of the accused. This comment is deplorable and I personally feel that it should not have been highlighted. However, the Head of State, who is the symbol of the unity of the country, must take note of it, and it is for him to reconcile both points of view to some extent by tempering justice with mercy. Such an action can in no way detract from the validity of the majority verdict."

Commenting on the clemency appeals for Mr. Bhutto, in an interview with a CBS TV team in Rawalpindi on February 14, 1979, Gen. Zia-ul-Haq said:[159] "*Let this not be a unilateral decision by me because people might think that I am against Mr. Bhutto and I have involved him in this case. I am going to take this case of clemency and this appeal of Mr. Bhutto to the military hierarchy, Military Council, get their verdict on the subject and also before the Cabinet. Let the Cabinet decide if and when the appeal comes, whether it should be accepted or rejected.*"

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159 *Pakistan Times,* February 18, 1979.

General Zia commented that Mr. Bhutto's case had been politicized so much by his own party and primarily by his own family that it gave the impression that his was a political trial. Actually, it was a criminal case in which neither the Government nor anybody else is involved. "It is a pure and simple criminal case ….. But in order to avoid the clutches of the law, they have politicized this and given this a colour as if it is a political battle between Ziaul-Haq and Mr. Bhutto, which it is not. It is purely and simply a criminal case and if the law is allowed to have its full course, nothing will happen in Pakistan", said the Chief Martial Law Administrator.

When asked about the clemency appeals from any head of Governments he said, "frankly speaking, some of them are very good friends of Pakistan and I appreciate their gesture. I grant them that perhaps this case has been presented to them, as I have said a little while ago, as a political case. So, they are probably appealing for clemency for a political leader in Pakistan. But quite frankly, I think it is not in order. It is purely an internal matter of Pakistan. How would they react if I or somebody else asked somebody to let off so and so. It is not right. I think it is directly or indirectly an interference in the internal affairs of the country".

Gen. Zia made several public statements saying he was against overruling the Supreme Court. Pakistan newspapers quoted the General as brushing off the appeals by world leaders as "a trade union activity, because all the politicians are asking to save a politician but not many non-politicians have asked me for clemency."[160]

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[160] *The Times of India, February 15, 1979.*

The Final Review

No rule is so general, which admits not some exception.

Robert Burton

The provision of law governing review applications is contained in Article 188 of the Constitution of Pakistan which reads as:

The Supreme Court shall have power, subject to the provisions of any act of Parliament and of any rules made by the Supreme Court to review any judgment or any order made by it.

Unlike the civil proceedings in respect of which the Civil Procedure Code independently provides for review the Criminal Procedure Code has no such provision with the result that no Court exercising jurisdiction under Cr.P.C. has the power of review. The Supreme Court is not governed by the Cr.P.C. and hence it can review its judgment in terms of Article 188 of the Constitution.

Review, however, is not a right which may be invoked against a judgment. It is neither an appeal nor a revision both of which lie with the next superior judicial authority. Legally it is merely a provision to enable the courts to correct any error that may have inadvertently crept into a judicial decision.

A review application can be filed only on the ground that there is a patent error of fact or law apparent on record, or a case can be made out of misreading of evidence or on the ground of discovery of fresh evidence which, with all due diligence, a party could not have got access to and, if available, would have made a material difference to the outcome of the court proceedings.

In the course of review proceedings, no new arguments can be raised, or neither any fresh pleas taken nor a request made for fresh appreciation of evidence. A review application has invariably to come up before the same set of judges who heard a particular case in the first instance and delivered the judgment under review. The only exception is in case a particular judge has retired or is not available for other reasons.

An incomplete preliminary review petition consisting of 97 pages was filed

with the Registrar of the Supreme Court at 10.30 a.m. on February 13, 1979 for a final legal review of the Supreme Court judgment rejecting Mr. Bhutto's appeal in the Nawab Mohammad Ahmad Khan murder case. A prayer was made for permission to add more grounds within 30 days from the date of the judgment.[161] The decision was taken after an hour-long meeting between Mr. Bhutto and Mr. Yahya Bakhtiar.[162] It is pertinent to be recalled that out of the original five judges only the Chief Justice upheld the death sentence. Three others, viz., Mr. Justice Dorab Patel, Mr. Justice Safdar Shah and Mr. Justice Mohammad Haleem proclaimed Mr. Bhutto innocent. The fifth Judge, Mr. Justice Kaiser Khan, attained the age of superannuation during the pendency of the case.

The Supreme Court stayed the hanging of Mr. Bhutto until the court disposed of the defence review petition. The stay of execution provided that Mr. Bhutto would be kept at Rawalpindi jail, where he had a seven by ten feet room, cot, table and chair and was allowed to get food brought from home. The highest Court said these facilities would be unchanged and it allowed an increase from four to six in the number of lawyers permitted to visit him.

A wrangle between Mr. Bhutto's lawyer and the Chief Justice reflected the tension over the case. Mr. Bakhtiar said that he was worn out from working round the clock on the preliminary petition and must have 30 days before the hearing. Recalling that some reviews have been delayed for months, Mr. Bakhtiar asked why the Bhutto case was getting special treatment. The Chief Justice allowed a week's time and said "Mr. Bakhtiar, you have been seven months on this case. Forget about 30 days, if you are not prepared it is up to you to withdraw. We have devoted far too much time already, some of the justices are not in good health".

The hearing of the last-ditch plea started before the Full Bench of the Supreme Court on February 24, when 80 more pages of additional grounds were filed and prayed for more time because, the complete petition could not be filed.[163]

The Court dismissed an application submitted by Mr. Abdul Hafeez Pirzada praying that Mr. Justice Kaiser Khan who had retired after attaining the superannuation age and Mr. Justice Waheedud-din Ahmad who had fallen ill during the hearing should also be included in the Bench to hear the review petition.

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161 *Pakistan Times,* February 14, 1979.
162 *Indian Express,* February 8, 1979.
163 *Pakistan Tittles,* February 26, 1979.

Before Mr. Yahya Bakhtiar started his arguments, the Chief Justice spelled out the scope of the review petition and observed that it was not intended to be a rehearing and whatever the defence counsel wanted to say must be confined to the narrow scope of review.

He further observed that all the seven judges had come to the conclusion that the FSF was involved, the murder was committed by FSF men, and that Ghulam Hussain had masterminded the operation. Therefore, it had to he kept in mind that review did not amount to reopening the case.

Opening his arguments, Mr. Yahya Bakhtiar referred to the Lahore High Court judgment and said that if a conspirator or an abettor of murder was not present at the spot, or had not done the fatal injury, he should be sentenced to life imprisonment instead of death.

He further argued that the judgment of the Supreme Court was divided by four to three judges and this fact should be kept in mind while disposing of the petition. In such a case, the difference of opinion itself was a good ground for converting death sentence to life imprisonment, he submitted. Although, he could quote no authority in this behalf, he wanted it to be laid down now.

Mr. Yahya Bakhtiar, then submitted that it was a general principle that death sentence was not awarded in case of a vicarious liability. This was, however, disputed by the State Counsel, Mr. Batalvi, who pointed out that the Privy Council had in 1940 dismissed an appeal of Mirza Akbar who was not present on the spot of a killing but was given the death punishment.

Mr. Yahya Bakhtiar submitted that the Lahore High Court had gone out of the way to criticise the conduct of the appellant by observing that he was a Muslim in name only and that he had abused his power under the Constitution. It had also used these passages to give reasons for awarding deterrent punishment, while it could have given lesser punishment but for these paragraphs which had now been expunged by the Supreme Court.

The Supreme Court pointed out that the appellate Court had in its judgment considered the question of quantum of sentence.

Continuing his arguments on February 25, Mr. Yahya Bakhtiar,[164] cited a number of cases to prove his contention and submitted that when a Division Bench of a High Court was divided, the case was referred to the third Judge who gave the lesser punishment. The Court observed that in the case cited by

[164] *Pakistan Times,* February 26, 1979.

him, the third Judge re-examined the case himself and gave the verdict not on the basis of division of opinion but on merit. Mr. Yahya Bakhtiar, however, pleaded that the general tendency had been on the side of the lesser punishment.

Mr. Yahya Bakhtiar further made the plea that the Court should take note of the fact that the person against whom the conspiracy was hatched was not killed. Instead, somebody else was killed who was not intended to be killed.

He also referred to the introduction of Islamic laws and said that in Islam, the death sentence was awarded only in the case of intentional murder, and if a wrong person was killed, lesser punishment was given. He pleaded that factors to be taken into consideration should also include this.

Mr. Bakhtiar further submitted that in Islam there was no conception of an approver, and the State had no business to pardon a killer. He also referred to the qualifications of a witness in Islam. He submitted that the Court might or might not consider these submissions, but it was his duty to bring these to the notice of the Court.

Mr. Yahya Bakhtiar submitted that probable consequence was different from "in consequence of the act" and added that there was nothing on record to show that Mr. Bhutto wanted automatic weapons to be used for murder, or that he prepared the plan.

Hearing was adjourned until March 3 because of indisposition of Mr. Yahya Bakhtiar.[165]

Summing up his arguments on March *5, 1979,* Mr. Bakhtiar said that during the previous eight days he had pointed out 31 errors in the judgment. The whole case needed reconsideration and, therefore, the petition be admitted to provide full opportunity to the petitioner.

He submitted that supposing on some wrong advice given to him, the petitioner boycotted the proceedings in the trial court and became prejudiced, even then his case needed consideration because the life of a person was involved.

Justice Naseem Hassan: "You should have made this point on 20th of May."

Mr. Yahya Bakhtiar: "At that time, I was fighting for acquittal; at present, I am asking for reduction in the quantum of sentence, though still I would want

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[165] *The Times of India,* March 1, 1979.

acquittal".

After Mr. Yahya Bakhtiar had concluded, the Chief Justice asked the Counsel for State, Mr. Ijaz Hussain Batalvi to enlighten the Court on one or two points. These points included the crime of the abettor if he was not present at the site of occurrence, and the scope of a review petition. He also asked Mr. Bakhtiar to be ready if he had to say something after Mr. Batalvi.

The senior Counsel for the State, Mr. ljaz Batalvi, submitted before the Supreme Court on March 6 that Mr. Z. A. Bhutto's review petition against the court's judgment could not be entertained as it fell outside the scope of a review petition.

Mr. Batalvi also submitted that the quantum of sentence had never been a ground for review, provided it was legal.

Mr. Batalvi stated that the jurisdiction of review was a constitutional jurisdiction as specifically defined in Article 188 of the Constitution and its scope had been explained by the Court's own rules which stated that the review would be subject to law and practice— both law and practice were equally important.

In a criminal case it had been laid down that the review was possible only on the ground of an "error apparent on the face of the record." He dwelt at length what such an error meant and cited a large number of judgments by the Supreme Courts of Pakistan, India and Burma and of the Privy Council to show that an error of law did not fall within the definition of "error apparent on the face of the record". A different view of law was possible but that was hardly the basis for review and if at the review stage, the court came to the conclusion that a different view of law should have been taken the door was closed for review.

Pointing out that the Defence Counsel wanted the entire case to be reconsidered; he submitted that whatever the judgment, if discussion had taken place and conclusions drawn, no review was permissible even if they be erroneous. The review jurisdiction could not be used as a pretext to re-argue the whole case and the whole theme of the 31 errors submitted by the Defence Counsel was preposterous.

About the quantum of sentence, Mr. Batalvi submitted that it could not be reviewed since it was a legal sentence and that there was no such thing that if there was division, lesser punishment should be awarded.

Mr. Justice Haleem: There is a rule of caution. We are taking five lives for one life, that of a person who was not intended to be killed.

State Counsel: That cannot be gone into at the stage of review. There would have been no murder if the petitioner had not set the forces of evil into action. If someone else is killed, that too will be a murder and if there is a common motive, all will be guilty.

Mr. Justice Haleem: But there was no common motive here.

State Counsel: There was according to the majority judgment. My Lord, your judgment is not under debate, and cannot be referred to. There have been cases when in case of review, dissenting judges did not sit.

Explaining the concept of sentence, Mr. Batalvi referred to the case of Sufi Ghulam Mustafa, and submitted that he was not present on the spot. He was a party only to kill Ahmad Raza and not his father who was killed by a miscalculation. Yet all the seven judges had sentenced him to death, the State Counsel submitted.

He also cited a case of Burma where a former Prime Minister of that country U Saw had abetted and conspired the murder of an entire Cabinet of his country in 1948. Later, U Saw, along with the killers, was sentenced to death and this sentence was upheld by the Supreme Court of Burma even though he was not present on the spot, nor had he fired at the victims.

The counsel also quoted the decision of the Court in a review matter by a bench consisting of Mr. Justice Anwarul Haq, Mr. Justice Mohammad Akram, Mr. Justice Dorab Patel and Mr. Justice Mohammad Haleem in which it had been held that even if the construction of a law was erroneous, the review would not lie.

Mr. Justice Safdar Shah: The other party contends that the statute and established rules had been violated and the benefit of doubt had been given to the prosecution, is it not a ground for review?

Mr. Batalvi submitted that if the Supreme Court came to a finding, a finality was attached to it.

On March 7, 1979, Mr. Yahya Bakhtiar, while replying to the arguments of the senior Counsel for State, said that the Supreme Court was the first Court of Appeal and the normal rule that this Court would not go into facts was not strictly applicable in this case. The scope of review was, thus, not restricted in the present case.

The Court observed that there was distinction in the case of first appeal, but

the scope of review would still be "error apparent on the face of the record."

Mr. Bakhtiar listed three main points as the basis of his arguments. He submitted that even if a law was correctly or erroneously interpreted, it was not applied or was misapplied; there had been a wrong assumption of facts, and there had been a grave misreading of the evidence, or evidence which should have been considered or had not been considered.

He further submitted that inconsistent findings had been given, and conjectures, surmises and speculation had been used in arriving at conclusions, disregarding the evidence on record. Also, the benefit of doubt which was to go to the accused has been ignored. A process of law had been converted into aid of injustice and not to justice by giving the benefit of doubt to the prosecution. Never had anything like this happened before.

Chief Justice: It had not been done in this case also. Mr. Batalvi retorted that Mr. Bakhtiar's arguments were repetitive.

Speaking on the question of sentence, Mr. Bakhtiar said that it was as relevant as the question of guilt if there was an error apparent on the face of the record. The general trend was that if the abettor was not present, or if his role was less, lesser punishment was given.

He also made submissions on the issue of judgment of a divided Court and what could be the extenuating circumstances for lesser punishment in such a situation. He had submitted that in the present case three judges had found the petitioner innocent and in such a situation it was necessary to take a lenient view.

Mr. Bakhtiar asserted, "If on a particular point, no precedent was there in Court, then itself it was a ground so that the law was laid down."

After Mr. Bakhtiar's submissions, Mr. Batalvi spoke on the general principles of review. He submitted that according to law and rules, the majority judgment was the judgment of the Court, while a minority judgment was only an opinion and however valuable it might be, it could not count as part of the *ratio* as it played no part in the judgment. The Supreme Court decision was an institutional decision and was binding on everybody.

It was unnecessary to express the minority view; he said and added that it was another point that some of the judges held a view different from the judgment under review. The majority view was under attack and the verdict whether a review was to be admitted or not had to be a unanimous verdict. That was why review jurisdiction was distinguishable from the appellate jurisdiction.

The two points that were to be kept in view were firstly, that no judge was sitting as an appellate Court. If that was clear, then the rest would follow as day follows night.

The second point, he submitted, was the law, that is the majority decision, was applicable to everybody, including the judges who held the minority view. It was a question of judicial dignity not only of judicial propriety, which would resist all temptations for the dissenting judges to adopt another course.

He cited three cases and submitted that when the review petitions did not fall within the ambit, they were dismissed unanimously though the judgment was a majority judgment. He further submitted that if a person who was acquitted by a judge and sentenced to death by the majority asked for life imprisonment the result would be that the judge would be revising his own judgment which was debarred.

Justice Safdar Shah: We do not want to sit as an appellate Court since the judgment is a majority one. We should watch the majority but what if one of the majority judges changes his view and is inclined to admit the petition. What should be the role of the minority?

Mr. Batalvi: The division has not taken place for the first time. This has existed in the past and will continue in the future. It is not an exceptional situation.

Chief Justice: It is a demonstration of independence of the highest judicial body, and this is precisely what we have endeavored to do. We heard together, held discussions with each other and evolved our individual views. I am proud that my brothers are taking their own independent view.

Mr. Ghulam Ali Memon, one of the lawyers on the panel of Mr. Bhutto's defence counsel, died of a heart attack at Rawalpindi on March 9. The Supreme Court on March 11, granted a six-day adjournment in the review petition.

Preliminary hearing concluded on March 17, 1979, when it was resumed after a six-day adjournment.

Initiating his submissions by referring to Mr. Batalvi's arguments on the role of minority Judges in a review petition, Mr. Yahya Bakhtiar said he "disagreed" with the view that the minority judgment was a mere opinion, and that the review petition was to be rejected or accepted unanimously. He referred to the oath of a Judge, and submitted it was the duty of each Judge to express his view on law and in accordance with the judgment of the Court which was under attack and every Judge was to take his independent decision.

While submitting his arguments on inconsistent findings in the judgment sought to be reviewed, Mr. Bakhtiar, in aid of his contention referred to the evidence of Masood Mehmood, M.R. Welch, Saeed Ahmad Khan and Ghulam Hussain, and also to the recovery of empties and proceeding of the High Court in absence of the petitioner.

Summing up, Mr. Bakhtiar submitted that the general trend of the courts had been for lesser punishment, and he pleaded lesser punishment was called for in view of the fact that the person sought to be killed was not killed, the petitioner was not present at the place of occurrence. Masood Mehmood was not a reliable witness, judgment of the Supreme Court was divided and the High Court condemned him for not being a "good Muslim."

He submitted that the law had provided two sentences for the offence, and the court possessed the discretion, which should be used to award the lesser punishment.

Mr. Bhutto lost on March 24, 1979, the last Court battle to overturn his death sentence when his review petition was unanimously rejected by the seven-man Supreme Court after having 11 sessions spread over three weeks. In its 15-pages decision, written by Mr. Justice Mohammad Akram, the Court, however, included a paragraph in their ruling recommending clemency.

In suggesting clemency, the judges that said they supported Mr. Bakhtiar's claim that the sentence should be commuted to life imprisonment because Mr. Bhutto did not wield the murder weapon and was not at the scene of the crime. They said: Although we have not found it possible in law to review the sentence of death on the grounds urged by Mr. Yahya Bakhtiar, these are relevant for consideration by the executive authorities in the exercise of their prerogative of mercy.

Seizing on this paragraph Mr. Bhutto's lawyer Mr. Yahya Bakhtiar, said, "The death sentence is out. I feel relieved. But I am disappointed with the rest of the judgment. Mr. Bhutto should not be hanged after this."[166]

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[166] *The Times of India,* March 25, 1979.

Historic Hanging

General Zia had once announced that he would consider a mercy petition only if it were filed by Mr. Bhutto himself. For, he knew well enough that the former Premier would not plead for mercy from someone who was, after all, a servile underling of his up to July 5, 1977, and the appeal would also mean the admittance of guilt.

Disregarding Mr. Bhutto's own wishes, his sister Mrs. Munawarul-Islam and two of his close political associates—Pakistan's former Foreign Minister, Mr. Aziz Ahmed and Pakistan's former Finance Minister, Mr. Abdul Hafiz Pirzada—filed petitions for clemency to General Zia. General Zia-ul-Haq was thus not left to pretend that all legal processes in the case had not been completed and the responsibility was finally shifted to his shoulders.

Mr. Aziz Ahmed in a 500-word fervent appeal to the President said, "in spite of my admiration for him I have tried as far as possible under the circumstances, to base this appeal on an objective evaluation of our country's present situation and its future prospects. I beg of you, Mr. President to take a compassionate view and accept this appeal in the interest of our country's integrity and well-being".[167]

Leaders of Pakistan People's Party, after meeting in Islamabad for three days which ended on March 30, 1979, passed a resolution and issued it to the press on March 31, said, "Surely, commutation of the sentence will enhance the image of Pakistan. The Central Executive Committee of the Pakistan People's Party urges the President of Pakistan to exercise his powers under Article 45 of the Constitution of the Islamic Republic of Pakistan and to remit or commute the sentence of Mr. Bhutto—The country is passing through a grave crisis. The cause of the country and well-being of the people will be served by sparing the life of Mr. Bhutto."[168]

On April 3, Begum Nusrat Bhutto and Miss Benazir Bhutto were taken to meet Mr. Bhutto. The meeting lasted for two-and-a-half hours amidst strong indications that President Haq had decided to reject the mercy pleas and go ahead with the execution.

[167] Pakistan Times, April 1, 1979.
[168] *The Sunday Tribune,* April 1, 1979.

All the mercy petitions, recommendation of the Pakistan Supreme Court Judges, appeals by foreign Heads, petition of hundreds of Junior Officers in the Pakistan Army were rejected by the President. For the General it was a question of doing justice against a man he considered officially as "a criminal" and in private as "a bastard". The official communiqué from the Ministry of the Interior announced that "the President had rejected the mercy petitions according to usual procedure". Mr. Bhutto wrote his will at about 10.30 a.m. on Tuesday but destroyed it before the execution.

Ironically, Zulfikar Ali Bhutto was convinced that the threat of hanging him was a mere charade to terrify him. He had chided his wife and daughter, "Don't be silly, they can't hang me. It's all a *tamasha*".[169] Even when the guard woke him at 1.30 a.m. Pakistan Standard Time on Wednesday, April 4, he failed to realize the significance of their presence: He told them to leave him alone and let him sleep. When he saw the death warrant, he fainted muttering: "Allah help me, I am innocent".[170]

After he was revived, Mr. Bhutto was given a bath, allowed to shave off several weeks' growth of grey beard and then told to sign his will like a common criminal. He was asked to recite certain verses from the Holy *Quran.*

Mr. Bhutto was allowed to wear his own *Salwar* and *Kameez,* the traditional Pakistani dress, instead of the loose fitting black outfit prescribed in jail regulations. His hands were tied behind him when he left the cell, and he wore open sandals on his feet. He was escorted there by prison officials, a senior army officer and a magistrate.

Other prisoners chanted in a loud chorus, verses from the Holy *Quran* as Mr. Bhutto was led past to the gallows. Bhutto walked slowly, his eyes on the ground and his lips closed.

Most executions are carried out just before dawn but Mr. Bhutto was taken to the gallows at the unusual early hour of 2.00 a.m. (local time) so that his body could be flown hundreds of kilometers to the south and buried safely near his farm house in Naudero in Sindh province before most people could realize what had happened.

At the platform, the magistrate on duty identified Bhutto as the condemned prisoner, the warden read out the death warrant and Medical Officer Asghar Hussain, certified him fit for hanging. Bhutto was then handed over to the veteran executioner. The Superintendent and Deputy Superintendent read out the

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169 *India Today,* April 16, 1979.
170 *India Today,* April 16, 1979.

text of the "black warrant" ordering his execution.

Bhutto's legs were tied and the rope noose was fixed about his neck by the hangman. The former Prime Minister complained that "it is very uncomfortable" and asked that the rope be loosened. It was loosened a bit and the hangman announced all in readiness.

At the warden's signal, the trap was opened with the sliding of a wooden plank from under Bhutto's feet. The rope tightened and Bhutto's head slumped to his shoulders. The fallen leader of Pakistan was kept hanging for 35 minutes, after which the magistrate and a physician certified him dead. Thus, in the dark moonless night the "foul deed" was done, while the people of Pakistan slept.

The Historic Hanging was carried out by Tara Masih, a Christian Pakistani, who was paid Rs. 25 in Rawalpindi district jail which was built in 1870. Masih, who runs a general store and comes from a long line of hangmen, regarded the job as an honour. Tara Masih's father had hanged India's Freedom Fighter and hero Bhagat Singh.

A turbulent career was buried at 10.30 a.m. at Garhi Khuda Baksh near Nau Dero, Larkana near his father Shah Nawaz Bhutto's grave. The funeral was attended by two uncles, Sardar Pir Baksh Bhutto and Sardar Nabi Baksh Bhutto, his first wife Shiren Amir Begum, a handful of relatives and friends, a number of prominent villagers and some local officials. Begum Nusrat and daughter Benazir could not attend because of their being under house arrest at a police compound outside Rawalpindi. Later, on April 7, they were taken under escort to see Mr. Bhutto's grave. His last wish was not fulfilled by not burying him at Lahore, the Stalingrad of Pakistan.

Surely he was not destined to die like this, as a common criminal and fallen man? This suave, sophisticated aristocrat, who had studied at Oxford and Berkeley, had once been called the John F. Kennedy of Asia. At one time, Bhutto seemed destined for a place in Pakistan's history on par with the father of the nation—Mohammad Ali Jinah.[171] Bhutto was a natural leader. He was a shrewd politician, very unpredictable, and always ahead of the others. His ambition had no boundaries ….. and yet he went with a hangman's noose around his neck.

From his stinking, verminous cell the *Fakhr-e-Asia* and *Quaid-e-Awam* of Pakistan defied his tormentor, Zia-ul-Haq to do his worst:

"I was born to make a nation, to serve a people, to overcome an impending doom. I was not born to wither away in a death cell, and to mount the gallows to

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[171] *India Today, April 16, 1979.*

fulfill the vindictive lust of an ungrateful and treacherous man...

I will show them how to die.

The world will see how the great leader goes. How the leader of his people goes with courage and dignity.

How the leader of the third world goes,
and how the leader of the Islamic Summit goes."